TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 88.

THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

OSMUN LILES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED OCTOBER 11, 1884.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and eighty-three, before the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

OSMUN LILES
v.
THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY. } 7604.

Civil action.

Be it remembered that heretofore, to wit, at the November term of said court, on the 14th day of March, 1883, before the Honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Messrs. Kennedy & Stein and Thompson & Marsh, his attorneys, and files in this court a certified
2 transcript of the proceedings in the above-entitled cause from the Randolph circuit court, and said transcript is in the words following, to wit:

STATE OF INDIANA, } *ss:*
Randolph County, }

Pleas at a regular term of the Randolph circuit court, begun, held, and continued at the court-house, in Winchester, Randolph county, and State of Indiana, on Monday, the twentieth day of November, A. D. 1882, before the Honorable Leander J. Monks, sole judge of the 25th judicial circuit of the State of Indiana, said circuit being constituted of the counties of Randolph and Delaware, in said State.

OSMUN LILES
v.
THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY. } No. 4202.

And now be it remembered that heretofore, to wit, on the 14th day of July, A. D. 1882, the plaintiff, by J. W. Stein and Thompson and Marsh, his attorneys, came and filed in the office of the clerk of this court his complaint, which is in the words and figures following to wit:

Osmun Liles, plaintiff, complains of The Grand Rapids and Indiana Railroad Company, defendant, and says that said de-
3 fendant is a corporation duly and legally organized under and pursuant to the statutes of the States of Indiana and Michigan; that on the 27th day of June, 1881, and for a long time prior thereto said defendant was in the possession of and was engaged in running and operating a railroad extending from the city of

Richmond, in Wayne county, Indiana, to the city of Petoskey, in Emmett county, Michigan; that said railroad so run and operated by said defendant passes through the counties of Wayne, Randolph, Jay, Adams, Allen, Noble, and Lagrange, in the said State of Indiana, and on north to said Petoskey; that said defendant was at said time engaged in carrying and transporting passengers and freight for hire; that on said 27th day of June, 1881, and for a long time prior thereto, the said plaintiff was and had been employed and engaged by defendant for hire as a brakeman on the freight trains so run and operated as aforesaid on and over said defendant's said railroad; that by the terms of plaintiff's said employment as such brakeman for defendant he, the said plaintiff, among other duties, was required to ride on freight trains of said defend-
4 ant when said trains were engaged in transporting freight on and over defendant's said road, and to apply the brakes to said freight cars when properly directed and signalled by the person or persons in charge of said trains and in charge of the engines thereto attached.

And plaintiff says that on said 27th day of June he was ordered and directed by defendant to go north from said city of Fort Wayne on and with the first section of train number eleven, said train consisting of an engine, tender, and twenty-six freight cars; that as such brakeman and in the discharge of his duties as such brakeman and servant of the said defendant he went with and upon said train on and over said defendant's said railroad; that said train was made up in the car-yard of defendant at said city of Fort Wayne; that said plaintiff was unacquainted with the cars which composed said train, and was unacquainted with and had no knowledge of the condition and state of repairs of said cars composing said train and of the condition and state of the brakes to said cars attached; that it was after night and dark when said train was so made up in defendant's said yard and was
5 dark when plaintiff went upon said train, and continued so up to the time of the happening of the accident hereinafter named; and plaintiff charges and avers that the brake and the rod or shaft attached to said brake by a chain, and the wheel or rim attached to said rod or shaft upon and attached to one of said cars in said train, to wit, number 1397, Union Line, and each of them was broken, out of repair, and unsafe, in this, that the staple which held said rod or shaft to the body of said car had been drawn out of the frame and wood of the car, and that the key and pin which held the rod of said brake and the shaft thereof to the said car and to the frame and wood thereof was, and had been before said time, taken out and removed from said rod and shaft, and that the stirrup and support of said brake was cracked, rusty, and broken, and that said brake and the rod and shaft thereof was and were not securely fastened to said car, but that the same was insecure and unsafe; that the inner end of the rod and shaft to which said brake wheel or rim was attached was set into soft pine wood, and
6 that the said soft wood into which said rod and shaft was set was worn and broken away until the same was insecure, un-

safe, and dangerous, and that the wheel or rim of said brake was broken and cracked and eaten up by rust; that plaintiff had no notice or knowledge of the condition of said brake, staple, — rod, or that the inner end of said rod and shaft was set into soft wood, and wheel or rim of said brake or either of them at any time prior to the happening of the accident hereinafter named; that after said train had left said city of Fort Wayne, and while the same was passing over defendant's said road in said Noble county, the engineer in charge of said train and in charge of *said train and in charge of* the engine attached to said train signalled the plaintiff to apply the brakes to the cars of said train; that plaintiff, in the discharge of his duties as such brakeman and as the servant of said defendant, set and applied the brake in said car 1397, and while so engaged in setting and applying said brake, as the servant and employee of defendant, without any fault or negligence
7 on his part, said wheel and rim of said brake broke and parted and threw plaintiff to and upon the ground and on the railroad track and under the cars of said train while the same was in motion; that the cars and car-wheels ran upon and over the left leg of said plaintiff and mangled, wounded, and bruised the same, so that it was necessary to have the same amputated, and the said leg was amputated, and the plaintiff's back and spine *was* seriously and permanently injured by said fall. And plaintiff says that said defendant negligently suffered and permitted said brake and rod or shaft to said brake attached and said staple and the wheel or rim to said shaft or rod in said car to be and remain out of repair, broken, and unsafe, and that said injuries to this plaintiff were occasioned by the said carelessness and negligence of said defendant in suffering and permitting said parts of said car to be and remain out of repair and unsafe, and all of which occurred without any fault or negligence of this plaintiff; that said br-ak*es*, defects, and im-
8 perfections in said brake wheel or rim brake hanger and in the said car and the defective manner in which said brake rod was inserted in the end of said car, and each of the said br-ak*es* and defects was open and visible and would have been discovered by a proper inspection of said car and were known by said defendant; that by reason of said injuries plaintiff has been permanently disabled and crippled and prevented from doing and performing ordinary work and labor and suffered great pain and anguish, and has been put to great expense in procuring medical and surgical aid in and about the curing and healing said injuries, to wit, the sum of five hundred dollars. Wherefore plaintiff sues and demands judgment for ten thousand dollars and other proper relief.

Par. 2. For another and second paragraph of complaint Osmun Liles, plaintiff, complains of The Grand Rapids and Indiana Railroad Company, defendant, and says that said defendant is a corporation duly and legally organized; that on the 27th day of
9 June, 1881, and for a long time prior thereto, said defendant was engaged in running and operating a certain railroad extending from the city of Richmond, Indiana, to the city of Petoskey, Michigan; that said railroad so run and operated passes through

the counties of Wayne, Randolph, Jay, Adams, Allen, Noble, and Lagrange, in said State of Indiana, and on north to said city of Petoskey; that said defendant was at said time engaged in carrying and transporting passengers and freight over said railroad for hire; that on said 27th day of June, 1881, and for a long time prior thereto, said plaintiff was and had been employed and engaged by defendant for hire as a brakeman on said defendant's said road; that on said 27th day of June, while plaintiff was in the discharge of his duties as such brakeman and while braking on the said cars of said defendant pursuant to the terms and conditions of his hiring as such brakeman, and while engaged in his duties as such employee and servant of said defendant, at and in the county of Lagrange, in said State of Indiana, while engaged in setting and applying a brake on a car attached to one of the freight trains of said de-
10 fendant, the wheel or rim of said brake broke and separated and, by said breaking and separating, threw plaintiff down upon the ground and upon defendant's railroad track and under the cars and train of defendant while said cars and train were in motion; that by said fall said plaintiff's back and spine were seriously and permanently injured, and while so upon the ground on said railroad track and under said train and cars said cars and car-wheels ran upon, over, and against plaintiff, and upon, over, and against the left leg of plaintiff and bruised, wounded, and mangled said leg until the same had to be amputated, and the same was amputated; and plaintiff says that said injuries were inflicted upon him because the said car of said defendants was, by the carelessness and negligence of said defendant, built and constructed of improper and worthless material, and that said injury resulted to him because defendant carelessly and negligently suffered and permitted said car and the brake-shaft of the brake and the wheel or rim attached to said shaft or rod of said brake to be and remain out of
11 repair, unsafe, and dangerous for use; that plaintiff had no notice or knowledge whatever of the unsafe and dangerous condition of said car and the brake shaft or rod of said brake and the rim or wheel of said brake or of the unsafe or dangerous condition of either of them; that said accident and injuries to this plaintiff and the breaking of said car and the rim or wheel of said brake each and all happened without any fault or negligence of this plaintiff; that said br-akes, cracks, defects, and imperfections in said brake wheel or rim br-ake hanger and said car and the imperfect and insecure manner in which said end of said brake-rod was fastened in the end of said car, and each and every of said defects and imperfections were open and visible and could and would have been discovered by an inspection of said car; that by reason of said injuries said plaintiff suffered great pain and anguish of body and mind, and is greatly and permanently crippled, and is now and will be for his natural life prevented from doing or performing ordinary work and labor, and has been put to great
12 expense in procuring medical and surgical aid in and about the healing and curing of said hurts and wounds, and for nursing, to wit, the sum of five hundred dollars.

Wherefore plaintiff sues and demands judgment for ten thousand dollars.

J. W. STEIN,
THOMPSON AND MARSH,
Att'ys for Plaintiff.

And be it remembered that on the said 14th day of July, 1882, a summons was issued on said complaint to the sheriff of Randolph county, Indiana, by order of the attorneys for the plaintiff; which summons reads in these words, to wit:

THE STATE OF INDIANA, } ss:
Randolph County, }

The State of Indiana to the sheriff — said county, Greeting:

You are hereby commanded to summon the Grand Rapids and Indiana Railroad Company to appear in the circuit court of Randolph county, before the judges thereof, on the first day of the next term, to be held at the court-house in Winchester on the first Monday of September, 1882, to answer the complaint of Osmun Liles—demand, $5,000—civil action, and of this writ make due return.

Witness Isaiah P. Watts, clerk of said court, and the seal thereof hereunto affixed this 14th day of July, 1882.

[Seal of the Circuit Court.]

ISAIAH P. WATTS, *Clerk.*

13 And that the return of the sheriff endorsed on said writ is in these words, to wit:

"Served on the Grand Rapids and Indiana R. R. Co. by reading the within writ to and in the presence of Wm. B. Miller, the agent of said company, at Winchester, and to and in the presence of J. T. Nixon, a conductor of a passenger train on said Grand Rapids and Indiana Railroad Company's road, and by leaving a copy of the same with said Nixon, these being the highest officers of said company found in my bailiwick at this time; said service on said Miller was on July 15th, 1882, and on said Nixon on July 19th, 1882.

RALPH V. MURRAY,
Sheriff of Randolph County.

And that on the said 14th day of July, 1882, by order of the plaintiff's attorney, the following other summons was issued in said cause directed to the sheriff of Allen county, to wit:

THE STATE OF INDIANA, } ss:
Randolph County }

The State of Indiana to the sheriff of Allen county, Greeting:

You are hereby commanded to summon the Grand Rapids and Indiana Railroad Company to appear in the circuit court of Randolph county, before the judge thereof, on the first day of the next

term to be held at the court-house, in Winchester, on the
14 1st Monday of September, 1882, to answer the complaint of Osmun Liles—demand, $5,000—civil action, and of this writ make due return.

Witness Isaiah P. Watts, clerk of said court, and the seal thereof hereunto affixed this 14th day of July, 1882.

[Seal of Circuit Court.]

ISAIAH P. WATTS, *Clerk.*

And that the return of the sheriff endorsed on said writ is in these words, to wit:

Served on the Grand Rapids and Indiana Railroad Company by reading the within writ to and in the presence of Patrick S. O'Rourke, general superintendent of said Grand Rapids and Indiana Railroad Company, on the 17th day of July, 1882, and by delivering a true copy of said writ to said Patrick S. O'Rourke on said day, the Patrick S. O'Rourke being the highest representative officer and agent of said company found in my bailiwick at the time of service of said writ.

FRANKLIN K. COSGROVE, JR.,
Sheriff Allen County,
By PLATT J. WISE, *Deputy.*

And be it now remembered that afterwards, to wit, on Thursday, the 7th day of September, A. D. 1882, the same being the fourth day of a regular September term, 1882, of the said Randolph circuit court, begun, held, and continued at the court-house, in Winchester, in said Randolph county, in the State of Indiana, on Monday,
15 the 4th day of September, A. D. 1882, before the said Honorable Leander J. Monks, sole judges thereof, the following further proceedings were had in said cause, to wit:

Comes the defendant, by Allen Zollars, her counsel, and files her demurrer to each paragraph of the complaint herein in these words, to wit:

Comes now the defendant, The Grand Rapids and Indiana Railroad Company, by A. Zollars, its attorney, and demurs separately to each paragraph of the plaintiff's complaint for the reason that neither of said paragraph- state- facts sufficient to constitute a cause of action against the said defendant.

ALLEN ZOLLARS,
Att'y for Defendant.

And be it remembered that afterwards, to wit, on Friday, the 15th day of September, A. D. 1882, the same being the 11th judicial day of said term of said court, the following further proceedings were had in said cause, to wit:

Comes now the defendant, by counsel, and files her motion and affidavit in support thereof that the plaintiff is a non-resident of the State of Indiana; which motion and affidavit are in these words:

16 Comes the defendant, The Grand Rapids and Indiana Railroad Company, by Allen Zollars, its attorney, and moves the court for a bond for costs in the above case from the plaintiff. Affidavit "A," attached hereto and filed herewith, made a part of this motion.

ALLEN ZOLLARS,
Att'y for Def't.

"A."

Patrick S. O'Rourke, being duly sworn, says that he is one of the superintendents of the defendant, The Grand Rapids and Indiana Railroad Company, being superintendent of the division extending from Grand Rapids, Michigan, to Richmond, Indiana, & authorized to make this affidavit, and he says that the plaintiff, Osmun Liles, is a non-resident of the State of Indiana.

P. S. O'ROURKE.

Subscribed and sworn to before me, at Fort Wayne, Allen county, State of Indiana, this 14th day of September, 1882.

Witness my hand and official seal.

[NOTARIAL SEAL.] THOS. MEEGAN,
Notary Public in & for said Allen County, State of Indiana.

And the court, after inspecting the same, rules the said plaintiff to file an undertaking for costs herein on or before the — day of the present term of said court; and now the defendant also files her motion and affidavit in support thereof for a change of venue herein in these words, to wit:

17 Comes now the defendant, Grand Rapids and Indiana Railroad Company, by its attorney, A. Zollars, and moves the court to change the venue in the above-entitled cause from Randolph county. Affidavit "A," attached hereto and filed herewith, made a part of this motion.

A. ZOLLARS,
Att'y for Defendant.

"A."

Patrick S. O'Rourke, being duly sworn, says that he is one of the superintendents of the defendant, The Grand Rapids and Indiana Railroad Company, being especially superintendent of the division extending from Grand Rapids, Michigan, to Richmond, Indiana,, and as such authorized to make this affidavit; and he says that he has good reason to and does believe that said defendant cannot have a fair and impartial trial of the above cause in Randolph county for the reason that an odium attaches to said defendant in said county and among the citizens thereof, and for the reason that there is a local prejudice against said defendant in said county.

PATRICK S. O'ROURKE.

Sworn to and subscribed before me, at Fort Wayne, in Allen county, State of Indiana, on this 14th day of September, 1882.

Witness my hand and official seal.

[NOTARIAL SEAL.] THOMAS MEEGAN,
Notary Public in and for Allen County, State of Indiana.

18 And be it remembered that afterwards, to wit, on Saturday, September 23d, 1882, the same being the 18th judicial day of the court and term aforesaid, the following further proceedings were had in said cause, to wit:

Comes the plaintiff, by counsel, and files his undertaking for costs, which is approved by the court and reads as follows:

"We undertake that the plaintiff shall pay to the defendant all costs that may accrue in this action to any officer or person.

"OSMUN LILES.
"JOSEPH LILES.
"WILLIAM A. THOMPSON.
"A. O. MARSH."

And be it remembered that afterwards, to wit, on Thursday, the 28th day of September, A. D. 1882, the same being the 22d day of court and term aforesaid, the following further proceedings were had in said cause, to wit:

Come the parties, by counsel, and the affidavit and motion for a change of venue is submitted to and overruled by the court; to which ruling of court the defendant excepts.

And be it remembered that afterwards, to wit, on Thursday, the 23d day of November, A. D. 1882, the same being the 4th judicial day of a regular November term, 1882, of said court, begun, held, and continued at the court-house, in Winchester, on Monday,
19 the 20th day of November, 1882, before the Honorable Leander J. Monks, sole judge of said court, the following further proceedings were had in said cause, to wit:

Come the parties, by counsel, and the demurrer to each paragraph of the complaint is submitted to and overruled by the court; to which ruling of court the defendant excepts; and thereupon the defendant files her answer in these words:

Comes now the defendant, The Grand Rapids and Indiana Railroad Company, by Allen Zollars, its attorney, and, for answer to the complaint herein, denies each and every allegation therein contained.

2d. And for a second and further answer said defendant says that the car upon which was the brake mentioned by the plaintiff in his complaint was not manufactured by the defendant, nor was the brake upon the same manufactured by the defendant, nor was said car or brake on the same the property of the defendant at the time of the alleged accident or at any other time. And it says further that the said train upon which the plaintiff was injured was made up in the yards of the company at Fort Wayne on the evening and night of the alleged accident, and said car number 1397 was

20 at said time coupled into said train. And it says further said car was the property of the Pennsylvania or the Union Line Company, and was loaded with material and merchandise to be transported north, and said car was received by the defendant at Fort Wayne, Indiana, on the evening and night of said accident from the Pennsylvania Company, a company owning and operating the Pittsburgh, Fort Wayne and Chicago railroad by a line of railroad extending from Pittsburgh, Pa., to Chicago, Illinois, through Fort Wayne, Indiana, to be by the defendant transported over its railroad north to Grand Rapids, State of Michigan. And it says further that at the time said car was received by the defendant and coupled with said train the defendant did not know and could not, by the exercise of ordinary care, have known of any of the alleged defects in said brake or the different parts of the same, and that the plaintiff had the same and better opportunities to know of said defects than the defendant. Wherefore defendant says that it has
21 been guilty of no wrong and is in no way liable to the plaintiff and demands judgment for costs.

ALLEN ZOLLARS,
Att'y for Def't.

And the plaintiff is ruled to reply.

And be it remembered that afterwards, to wit, on Friday, the 24th day of November, A. D. 1882, the same being the 5th judicial day of court and term last aforesaid, the following further proceedings were had in said cause, to wit:

Comes the plaintiff, by counsel, and files his demurrer to the 2d paragraph of answer in these words, to wit:

Comes now the plaintiff in the above-entitled cause and demurs to the second paragraph of defendant's answer herein, and for grounds of demurrer says that said paragraph of said answer does not state facts sufficient to constitute a cause of defense.

KENNEDY & STEIN,
THOMPSON & MARSH,
Att'ys for Pl'ff.

And be it remembered that afterwards, to wit, on Thursday, the 7th day of December, 1882, the same being the 16th day of the court and term aforesaid, the following further proceedings were had in said cause, to wit:

Comes now the defendant, by Allen Zollars, her attorney,
22 and files her 3d paragraph of answer, which is in these words:

Comes the defendant and for third and further answer says that at the time of the injury to plaintiff, as set out in the complaint, he was in the employ of the defendant as a brakeman on its freight trains; that the car upon which was the brake that gave way and caused the injury to plaintiff was not one of the cars of the defendant, but belonged to the Pennsylvania Company, and was received by the defendant at Fort Wayne load-s with freight to be transported north over its line.

It says further that it had no knowledge that any of the brakes on said car were out of order or in any way dangerous, and was not guilty of any negligence in not having such knowledge; that at the time said car was so received and before that time and at the time of the alleged injury it had in its employ a competent and careful man as car inspector, whose duty it was at all times to inspect the cars of the defendant and all cars transferred to its road from other companies, and whose duty it was to have inspected and examined the said car upon which was said brake, and to have reported to the defendant any defects in brakes or otherwise.

23 And it says further that if said inspection did not inspect and examine said car, or did not notify plaintiff of any defects in said brake, or was in any way negligent in and about the performance of his said duty it was the neglect and negligence of a co-employee with the plaintiff, for which this defendant is not responsible.

Wherefore defendant — judgment.

And now the plaintiff, by Thompson and Marsh, his counsel, comes and files his demurrer to said 3d paragraph of answer; which demurrer is in these words:

Comes now the plaintiff and demurs to the third paragraph of answer herein and, for ground of demurrer, says that said paragraph does not contain facts sufficient to constitute a defense to plaintiff's complaint and cause of action.

KENNEDY & STEIN,
THOMPSON & MARSH,
Att'ys for Pl'ff.

And be it further remembered that afterwards, to wit, on Friday, the 8th day of December, 1882, the same being the 17th judicial day of the court and term aforesaid, the following further proceedings were had in said cause, to wit:

24 Comes the plaintiff, by his counsel, and the defendant, by her counsel, comes also, and now the plaintiff files his application, affidavit, bond, and motion for the removal of this cause to the United States circuit court for the district of Indiana; which said application, affidavit, bond, and motion are in these words, to wit:

Comes now the plaintiff herein and moves the court on the petition and application, bond and affidavits, on file in this case to certify and remove this cause to the United States circuit court within and for the district of Indiana.

KENNEDY & STEIN,
THOMPSON & MARSH,
Att'ys for Plaintiff.

Petition for Removal to the Circuit Court of the United States, District of Indiana.

To the hon. judge of the Randolph circuit court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is wholly between citizens of
25 different States, and that the petitioner was, at the time of the commencement of this suit and still is, a citizen of the State of Ohio, and that the defendant, the said Grand Rapids and Indiana Railroad Company, was, at the time of the commencement of this suit and still is, a citizen of the State of Indiana and a corporation organized under and by virtue of the laws of the State of Indiana, and that said defendant is not a resident of the State of Ohio.

Your petitioner further shows that he is the sole plaintiff in said above-entitled suit, and that the said defendant, The Grand Rapids and Indiana Railroad Company, is the sole defendant in said above-entitled suit.

And your petitioner herewith tenders a bond, with good and sufficient surety, for his entering in the circuit court of the United States for the district of Indiana, on the first day of its next session, a copy of the record of this suit and for paying all costs that may be awarded by said circuit court of the United States if said court shall hold that this suit was wrongfully or improperly removed thereto.

26 And your petitioner further shows that this present term, to wit, the November term, 1882, of this the Randolph circuit court is and was the first term of said court at which said cause could be first tried, and is the term of said court at which the said cause could be first tried, and he makes this application before the trial of said cause.

And he prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said security and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the district of Indiana; and he will ever pray.

THOMPSON & MARSH,
KENNEDY & STEIN,
Attorneys for Petitioner.

I, Osmun Liles, being first duly sworn, do say upon my oath that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

OSMUN LILES.

Subscribed by the said Osmun Liles in my presence and by him sworn to before me this 8th day of December, 1882.

ISAIAH P. WATTS,
Clerk Randolph Cir. Court.

I, Osmun Liles, being duly sworn, on my oath do say that
27 I am the sole plaintiff in the above-entitled cause; that I have reason to believe and do believe that from prejudice and local influence I will not be able to obtain justice in the said State court, to wit, the said Randolph circuit court.

OSMUN LILES.

Subscribed by the said Osmun Liles in my presence and by him sworn to before me, at Winchester, Randolph county, Indiana, this 8th day of December, A. D. 1882.

ISAIAH P. WATTS,
Clerk Randolph Cir. C't.

"*Bond.*"

Know all men by these presents that I, Osmun Liles, as principal, and Joseph Liles, Robert P. Kennedy, James W. Stein, William A. Thompson, Albert O. Marsh, as sureties, are held and firmly bound unto the Grand Rapids and Indiana Railroad Company in the penal sum of one thousand dollars; the payment whereof, well and truly to be made unto the said Grand Rapids and Indiana Railroad Company, its successors and assigns, we bind ourselves, our heirs, representatives, jointly and severally, firmly by these presents, yet upon these conditions:

The said Osmun Liles having petitioned the circuit — of Randolph county, State of Indiana, for the removal of a certain cause therein pending, wherein the said Osmun Liles was plaintiff
28 and The Grand Rapids and Indiana Railroad Company was defendant, to the circuit court of the United States in and for the district of Indiana:

Now, if the said Osmum Liles, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record and of all process, pleadings, depositions, testimony, and other proceedings in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to be and remain in full force and virtue.

Witness our hands and seals this 8th day of December, A. D. 1882.

OSMUN LILES.	[SEAL.]
JOSEPH LILES.	[SEAL.]
ROB'T P. KENNEDY.	[SEAL.]
JAMES W. STEEN.	[SEAL.]
WILLIAM A. THOMPSON.	[SEAL.]
ALBERT O. MARSH.	[SEAL.]

I, Joseph Liles, a resident of the county of Logan and State of Ohio, one of the sureties named in the foregoing bond, being duly sworn, do depose and say that I am a resident of said county
29 of Logan and State of Ohio and a property holder therein; that I am worth the sum of one thousand dollars over and above all my debts and liabilities and exclusive of property by law

exempt from execution; that I have property in the State of Ohio liab*ility* to execution of the value of one thousand dollars.

JOSEPH LILES.

Subscribed in my presence by Joseph Liles and by him sworn to before me this 8th day of December, A. D. 1882.

ISAIAH P. WATTS,
Cl'k Randolph Circuit C't.

We, Robert P. Kennedy and James W. Stein, two of the sureties named in the foregoing bond, being each duly sworn, do depose and say that we are residents of the State of Ohio and are each property holders therein; that we are each worth the sum of one thousand — over and above all our debts and liabilities and exclusive of property by law exempt from execution; that we each have property in the State of Ohio liable to execution of the value of more than one thousand dollars.

ROB'T P. KENNEDY.
JAMES W. STEIN.

Subscribed in my presence by Robert P. Kennedy and James W. Stein and by them sworn to before me this 8th day of December, A. D. 1882.

ISAIAH P. WATTS,
Clerk Randolph Circuit Court.

I, William A. Thompson, of said Randolph county, one of the sureties named in the foregoing bond, do depose and say that
30 I am a resident of the State of Indiana and a property holder in said State; that I am worth the sum of one thousand dollars over and above all my debts and liabilities and exclusive of property exempt from execution; that I have property in the State of Indiana liable to execution of the value of one thousand dollars and more.

WILLIAM A. THOMPSON.

Subscribed in my presence by William A. Thompson and by him sworn to before me on this 8th day of December, 1882.

ISAIAH P. WATTS,
Cl'k Randolph Cir. C't.

I, Albert O. Marsh, of said county and State, one of the sureties named in the foregoing bond, depose and say that I am a resident of the said State of Indiana and a property holder in said State; that I am worth the sum of one thousand dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Indiana liable to execution of the value of more than one thousand dollars.

ALBERT O. MARSH.

Subscribed in my presence by Albert O. Marsh and by him sworn to before me this 8th day of December, 1882.

ISAIAH P. WATTS,
Cl'k Randolph Cir. C't.

31 And the court, having examined said bond and the sureties thereon, approves the same; and the court, having seen and inspected said motion and petition for removal of said cause and the affidavits therewith filed and being sufficiently advised in the premises, finds for the petitioner, and that the matters and things stated in said petition, application, and affidavits are true, and that said petitioner is entitled to remove and have said cause removed into the circuit court of the United States for the district of Indiana; and the court thereupon sustains said motion of the petitioner, and orders said cause and the record therein, together with copies of all process, pleadings, depositions, testimony, and other proceedings in said cause, be removed into the circuit court of the United States for the district of Indiana, and that no other proceedings be had in said cause in this court.

STATE OF INDIANA, *County of Randolph:*

I, Isaiah P. Watts, clerk of the circuit court within and for Randolph county, in the State of Indiana, do hereby certify the
32 above and foregoing to be a full, true, and complete copy and transcript of all the process, pleadings, records, entries, depositions, testimony, and other proceedings in said cause as taken and copied from the records and files in my office and in my custody as such clerk.

Witness my name and the seal of the circuit court of said county, affixed at Winchester, Indiana, this the 25th day of January, 1883.

[SEAL.] ISAIAH P. WATTS,
Clerk Randolph Circuit Court.

And afterwards, to wit, at the May term of said circuit court of the United States for the district of Indiana, on the 15th day of May, 1883, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by John A. Holman, Esq., its attorney, and files its motion and affidavit to have this cause transferred to Fort Wayne, and said motion and affidavit are in the words following, to wit:

And this day this cause came on to be heard upon the motion of the defendant to have the same transferred to the circuit court of the United States for the district of Indiana, sitting at the city of Fort Wayne, in the State of Indiana, and was argued by counsel; in consideration whereof the court overrules said motion; to
33 all of which the defendant excepts.

And afterwards, to wit, at the May term of said court, on the 28th day of June, 1883, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by A. A. Chapin, Esq., its attorney, and files its motion and affidavit for the transfer of this cause to Fort Wayne.

And afterwards, to wit, at the May term of said court, on the 12th day of July, 1883, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

This day this cause came on to be heard upon the motion of the defendant to remove this cause from the U. S. circuit court at Indianapolis to the U. S. circuit court, holden at the city of Fort Wayne, and was argued by counsel, in consideration whereof the court does overrule said motion.

And afterwards, to wit, at the May term of said court, on the 11th day of September, 1883, before the Honorable William A.
34 Woods, judge as aforesaid of *of* said court, the following further proceedings in the above-entitled cause were had, to wit:

The demurrer to the second and third paragraphs of the answer herein having been argued by counsel and considered by the court, and the court being duly advised in the premises doth now sustain the same, and to the sustaining thereof the defendant now here excepts.

And afterwards, to wit, at the November term of said court, on the 26th day of November, 1883, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by counsel, and files its motion to suppress certain depositions herein in the words following, to wit:

Comes now the defendant and moves the court to suppress the depositions of Daniel L. Mason, Robert B. Williams, William T. Green, Joshua S. Rhinehart, and George Moon for the following reasons:

1st. Because the person who took said depositions did not put upon the envelope in which said depositions were enclosed
35 and sent to the clerk of the Randolph circuit court, in which this cause was pending when said depositions were taken, the names of the parties in this action, but the following only: Edward Liles *vs.* Grand Rapids & I. R. R. Co."

2d. Because the certificate of the officer who took said depositions fails to show that they were taken in the present action, but, on the contrary, shows that they were taken in an action different from this, the defendant being named as the "Grand Rapids railroad," that not being the name by which defendant is sued or the true name of this defendant.

3d. Because there is nothing to show or inform the court that the person who took said depositions had any authority to take said depositions or to take depositions at all.

A. A. CHAPIN,
Att'y for Def't.

Comes now the defendant, by counsel, and moves the court to suppress and strike out the answer to question 12 in the deposition of David L. Mason, for the — that all the knowledge the witness has

of the subject-matter of the question propounded is hearsay,
36 as disclosed by said answer.

Also the answer to question 13, for the reason that all the knowledge the witness has of the subject-matter of which — testifies in said answer is hearsay.

Also question 16 and answer thereto, because the testimony has reference to a brake-wheel about which the witness has no knowledge except by hearsay.

Also for the same reason the answer to question 17, and for the further reason that the witness states what he said at the time he made the examination concerning the condition of the wheel, which is inadmissible as original evidence.

Also to questions and answers 18, 19, & 20, because the testimony of the witness' said answer has reference to a brake-wheel about which the witness had no knowledge except through hearsay and because it does not appear that the wheel about which the witness is testifying is the one described in the complaint.

Also that in event the above motion, which is made severally to each question and answer, shall be sustained as to the whole
37 or any — thereof, then that all the answers on cross-examination on the same subject be also stricken out.

The defendant further moves severally to suppress and strike out questions and answers of the deposition of Joshua Rhinehart, number- 6, 6½, 7, 8, 9, 10, 11, 12, 13, & 14, because there is nothing in said testimony nor in his deposition to show that the brake-wheel he testifies about was the one the breaking of which caused the injury complained of, and for the further reason that the cross-examination shows by the answers of the witness therein that he had not the requisite knowledge and experience to give his opinion as to the character or cause of the break.

Also to answer to question 6½, for the further reason that it is not competent to testify as to and give in evidence conversations between him and the said O'Rourke which embrace the opinion of the witness as then expressed, because it is not shown that said O'Rourke assented to it, and if he did he had no power to bind the defendant by any admissions of that character, it not being a part of the *res gestæ*.

38 Also the answer to question 8, because the subject-matter thereof is incompetent and irrelevant.

Also the answer to question number eleven, because it is incompetent for the witness to state what he might have claimed at the time as to the character of the break or flaw.

And if said answers or any of them are stricken out, then defendant also moves to strike out the cross-examination on the same subject-matter that is stricken out of the direct examination.

The defendant further moves severally to each to strike out questions and answers in the deposition of George W. Moore numbered 5, 6, 7, 8, 9, 10, 11, & 12, because there is nothing in the testimony of the witness to show that the brake-wheel testified about is the one which broke and caused the injury to plaintiff, and because the witness in said answer gives his opinion as to the

condition of said wheel before it broke, he not being an expert, and because he does not give the facts upon which his opinion is based.

Defendant also moves to strike out the testimony of said
39 witness on cross-examination of any of the said matters about which he testified in chief, in event that the questions and answers as to the matters-in-chief should be stricken out.

The defendant also moves to suppress questions and answers and each of them, numbered 10, 11, 4, *and each of them* in the depositions of Frank Westler for the reason that the evidence of the skill and competency of the plaintiff as a brakeman and his attention to business generally and his judgment in setting brakes is incompetent and irrelevant, except as to the care, attention, and management of the brake at the time which he claims it broke and by reason of which he received the injury, and as to the attention and careful performance of his duties at the time the injury was received.

A. A. CHAPIN,
Att'y for Def't.

And afterwards, to wit, at the November term of said court, on the 3d day of December, 1883, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

40 Come now the parties—the plaintiff, by Kennedy & Stein and Thompson & Marsh, his attorneys, and the defendant by A. A. Chapin and W. S. O'Rourke, its attorneys—and thereupon the court, being sufficiently advised in the premises, doth now overrule the defendant's motion to suppress the depositions of Mason, Williams, Green, Rhinehart, and Moore herein; to which ruling of the court the defendant, by its attorneys, excepts. And at the same time the court doth sustain the defendant's motion to suppress the words "and pronounced it unsound," in answer 18 of direct deposition of Mason. And the court doth also strike out the question and answer No. 8 in the direct examination of Joshua Rhinehart, and question and answer No. 10 in the direct examination of Frank Westler, and the words "He was a man that tended to his business and used good judgment in setting his brakes," in the answer to question No. 11 of direct examination of Frank Westler. And the motion to suppress the depositions of Wilcox is sustained by the court. And the court doth now overrule the motion to suppress depositions as to all the other questions and *and* answers in said depositions to which ruling the defendant now excepts.

41 And at the same time, on said 3d day of December, 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and this cause now coming on to be tried, here comes a jury, to wit: Jesse N. Townsend, Simeon Blue, W. S. Meade, John B. Goodman, Sanford S. Ripley, Jonathan Dillon, Zachariah Senour, Nathan Morgan,

William B. Carter, William T. Pettinger, Jesse Cates, and John P. Cathcart, who, being duly empanneled and sworn and having partially heard the evidence herein, are by the court allowed to seperate until the calling of this court on to-morrow morning.

And afterwards, to wit, at the November term of said court, on the 4th day of December, 1883, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come again the parties by their respective attorneys, and the jury heretofore empanneled and sworn herein come also, and having heard the residue of the evidence and the argument of counsel and the charge of the court herein, now retire to their rooms to
42 consider of their verdict.

And afterwards, to wit, at the November term of said court, on the 5th day of December, 1883, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come again the parties, by their respective attorneys, and the jury heretofore empanneled and sworn herein come also and return into court the verdict following, to wit: We, the jury, find for the plaintiff and assess the damages at six thousand dollars ($6,000.00). Jesse N. Townsend, foreman. And thereupon the defendant, by its attorneys, files its motion for a new trial herein in the words following, to wit:

Comes now the defendant and moves for a new trial in this cause for the following reasons:

1. The court erred in refusing to suppress the depositions, in behalf of plaintiff, of David L. Mason, Robert B. Williams, William T. Green, Joshua S. Rhinehart, and George Moore upon the motion of defendant.

2. The court erred in refusing to suppress parts of the depositions of David L. Mason, R. B. Williams, W. T. Green, Joshua S.
43 Rhinehart, George Moore, and Frank Westler upon the motion of defendant and as set out in the written motion filed in this cause.

3. The court erred in refusing to give each of the written charges to the jury requested to be given by the defendant, numbered one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, and seventeen.

4. The court erred in giving the charge given by the court on his own motion to the jury.

5. The damages assessed are excessive.

6. The verdict of the jury is not sustained by sufficient evidence.

7. The verdict of the jury is contrary to the law.

CHAPIN & O'ROURKE,
Att'ys for Def't.

And the court, being sufficiently advised in the premises, doth now overrule said motion for a new trial herein.

It is therefore considered by the court that the plaintiff do recover of said defendant said sum of six thousand dollars ($6,000.00), together with his costs and charges in this behalf laid out and expended, taxed at $—.

And afterwards, to wit, at the November term of said court,
44 on the 25th day of January, 1884, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by counsel, and files its bill of exceptions herein in the words following, to wit:

Be it remembered that at the proper time, before entering upon the trial of this cause, the defendant moved in writing in these words:

Comes now the defendant and moves the court to suppress the depositions of David L. Mason, Robert B. Williams, William T. Green, Joshua S. Rhinehart, and George Moore for the following reasons:

1st. Because the person who took said depositions did not put upon the envelopes in which said depositions were enclosed and sent to the clerk of the Randolph circuit court, in which this cause was pending when said depositions were taken, the names of the parties in this action, but the following only: "Edward Lisle *vs.* Grand Rapids & I. R. R. Co."

2d. Because the certificate of the officer who took said
45 depositions fails to show that they were taken in the present action, but, on the contrary, shows that they were taken in action different from this, the defendant being named as the "Grand Rapids railroad," that not being the name by which defendant is sued or the true name of this defendant.

3d. Because there is nothing to show or inform the court that the person who took said depositions had any authority to take said depositions or to take depositions at all—A. A. Chapin, att'y for def't—to suppress the depositions of David C. Mason, Robert B. Williams, William T. Green, Joshua L. Rhinehart, and George Moore, and, in support of said motion, produced for the inspection of the court the envelope in which said disposition had been enclosed by the officer taking the same, and sent to the clerk of the Randolph circuit court, in the State of Indiana, in which this action was commenced and was then pending, and which said envelope had thereon this *subscription*, to wit:—"Edward Lisle *v.* Grand Rapids
& Ind. R. R. Co. Deposition of David Mason, Joshua L.
46 Rhinehart, George Moore, Rob't B. Williams, and Wm. T. Green. To the clerk of the circuit court, Winchester, Indiana. Filed Sept. 6, '82. I. S. Watts, clerk"—and no other superscription on the same.

And the defendant further produced to the court the depositions of said Mason, Rhinehart, Moore, Williams, & Green, which are hereinafter copied in these exceptions, and the certificate of the officer attached thereto, which certificate is in these words and figures:

STATE OF INDIANA, *Noble County:*

I, William L. Hosier, a justice of the peace in and for said county, do hereby certify that David L. Mason, R. B. Williams, Wm. T. Green, Joshua S. Rhinehart, & George Moore, the above-named deponents, were by me each severally first sworn to testify the truth, the whole truth, and nothing but the truth relating to the cause now pending in the Randolph circuit court, Randolph county, Indiana, wherein Osmun Liles is plaintiff and the Grand Rapids railroad is defendant; that the foregoing depositions were each and all reduced to writing by Chichester Holden, a disinterested person, in my presence and under my direction; that said deponents
47 severally subscribed his deposition after the same had been carefully read over to each of them; that the said defendant was present at the taking of said depositions by Allen Zollars, her attorney; that each and all of said depositions were taken at the town of Rome City, county of Noble, and State of Indiana, on the 22d day of August, 1882, between the hours of 10 o'clock a. m. and five o'clock p. m. of said day, agreeably in all respects to the annexed notice, except the change from the post office to my office.

In witness whereof I hereunto subscribe my name and affix my seal this 22d day of August, 1882.

WILLIAM L. HOSIER, [SEAL.]
Justice of the Peace.

And the court, having inspected the same, overruled said motion; to which ruling of the court the defendant at the proper time excepted.

And the defendant then moved in writing in these words:

Comes now the defendant, by counsel, and moves the court to suppress and strike out the answer to question 12 in the deposition of David L. Mason, for the reason that all the knowledge
48 the witness has of the subject-matter of the question propounded is hearsay as disclosed by said answer.

Also the answer to question 13, for the reason that all the knowledge the witness has of the subject-matter of which he testifies in said answer is hearsay.

Also question 16 and answer thereto, because the testimony has reference to a brake-wheel about which the witness has no knowledge, except by hearsay.

Also for the same reason the answer to question 17, and for the further reason that the witness states what he said at the time he made the examination concerning the condition of the wheel, which is inadmissable as original evidence.

Also to questions and answers 18, 19, and 20, because the testimony of the witness, said answer has reference to a break-wheel about which the witness had no knowledge, except through hearsay, and because it does not appear that the wheel about which the witness is testifying is the one described in the complaint.

Also that in event that the above motion, which is made
49 severally to each question and answer, shall be sustained to the whole or any part thereof, then that all the answers on cross-examination on the same subject be also stricken out.

The defendant further moves severally to suppress and strike out questions and answers of the deposition of Joshua Rhinehart, number- 6, 6½, 7, 8, 9, 10, 11, 12, 13, & 14, because there is nothing in said testimony nor in his deposition to show that the brake-wheel he testifies about was the one the breaking of which caused the injury complained of, and for the further reason that the cross-examination shows by the answers of the witness thereto that he had not the requisite knowledge and experience to give his opinion as to the character or cause of the brake.

Also to answer to question 6½, for the further reason that it is not competent to testify as to and give in evidence conversations between him and the said O'Rourke which embrace the opinion of the witness as then expressed, because it is not shown that said O'Rourke assented to it, and if he did he had no power to bind the
50 defendant by any admissions of that character, it not being a part of the *res gestæ*.

Also the answer to question number 8, because the subject-matter thereof is incompetent and irrelevant.

Also the answer to question number eleven, because it is incompetent for the witness to state what he might have claimed at the time as to the character of the break or flaw.

And if said answers or any of them are stricken out then defendant also moves to strike out the cross-examination on the same subject-matter that is stricken out of the direct examination.

The defendant further moves severally to each to strike out questions and answers in the deposition of George M. Moore numbered 5, 6, 7, 8, 9, 10, 11, & 12, because there is nothing in the testimony of the witness to show that the brake-wheel testified about is the one which broke and caused the injury to plaintiff, and because the witness in said answer gives his opinion as to the condition of said wheel before it broke, he not being an expert, and because he does not give the facts upon which his opinion is based.

51 Defendant also moves to strike out the testimony of said witness on cross-examination of any of the said matter about which he testified in chief, in event that the questions and answers as to the same matters-in-chief should be stricken out.

The defendant also moves to suppress questions and answers and each of them numbered 10, 11, 4, *and each of them* in the deposition of Frank Westler, for the reason that the evidence of the skill and competency of the plaintiff as a brakeman and his attention to business generally and his judgment in setting brakes is incompetent and irrelevant, except as to the care, attention and management of the brake at the time which he claims it broke and by reason of which he received the injury, and as to the attention and careful performance of his duties at the time the injury was received.

A. A. CHAPIN,
Att'y for Def't.

To suppress the several parts of the depositions of David L. Mason, Joshua Rhinehart, George Moore, and Frank Westler, which depositions are hereinafter copied in this bill of exceptions and to which reference is here made, and the court sustained said
52 motion as to these words in answer number 18 in the direct examination of said Mason, to wit: "and pronounced it unsound," but overruled the said motion as to the other parts of his deposition; to which ruling of the court in refusing to strike out the remaining parts of said deposition embraced in
53 said motion the defendant at the proper time excepted. And the court sustained the said motion to strike out question and answer number ten in the direct-examination of Frederick Westler, and that part of the answer in the direct examination to question number eleven in his deposition in these words: "He was a man that tended to his own business and used good judgment in setting brakes" but overruled the said motion as to all the other parts of said deposition referred to in said motion; to which ruling, in *referring* to suppress the same the defendant at the proper time, then and there excepted.

And be it further remembered that on the trial of this cause at said term the following evidence was given to the jury, to wit:

OSMAN LILES, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Examination-in-chief.

Questions by General KENNEDY:

1 Q. State your name.
A. Osman Liles.
2 Q. State where you live.
A. I live in Logan county, Ohio.
3 Q. Are you a citizen of that county or not?
A. Yes, sir; I am.
4 Q. How old are you?
A. I am twenty-three years of age.
5 Q. Where were you employed in June and July, 1881?
54 A. Well, I was employed in June, up until the 27th, on the Grand Rapids and Indiana Railroad Company.
6 Q. How long had you been employed by that company?
A. I went on in February, I think.
7 Q. What duty were you performing on the railroad?
A. As a brakeman.
8 Q. On what part of the road were you working?
A. Well, I work from Fort Wayne to Grand Rapids most generally; I was a few times at Richmond from Fort Wayne.
9 Q. Where does that road run?
A. Well, I do not know; I think it runs from Fort Wayne to Petoskey, as far as I know; I have been over it from Richmond, Indiana, north to Grand Rapids, north.
10 Q. Through what counties and States?

A. Through Indiana and Michigan.

11 Q. Do you know what counties it runs through?

A. I know one or two; Noble county and Lagrange county, Indiana.

12 Q. What towns does it run through?

A. It runs through Kalamazoo, Sturgis, Lagrange, Lima, Rome City, Kendallville, and all those places along there. I can name the stations over from Fort Wayne to Grand Rapids.

13 Q. State what towns it runs through?

A. The first town is Walden; next is Huntertown, and
55 the next is La Otto, and the next is Swan, and the next is Avilla; and then there is a station called Lisbon, and then Kendallville, and then Rome City, and Walcottville, and Valentine, and Lagrange, and Lima, and Sturgis, and there is a few little stations in there that I have forgotten; and then comes Kalamazoo, and then Mendon and Vicksburg, and I guess that is all that I can recollect of. By studying, I could name all of them. I believe the next station is Coopers, then Travis, and then Plainwell, Monteith, and Martin.

14 Q. Name some of the more prominent ones at this end.

A. I have named them from Fort Wayne.

15 Q. Well, name them from Fort Wayne south now.

A. I cannot name the stations from Fort Wayne south. Let me see: Portland, Decatur, Geneva, Fountain City, and Richmond, Ind.

16 Q. Now, where is Rome City situated with regard to Fort Wayne—north or south?

A. It is north of Fort Wayne.

17 Q. How far from Fort Wayne?

A. It is about thirty-eight miles, or along there.

18 Q. What kind of a train were you working upon on the 27th of June?

A. A freight train.

19 Q. Of what was the train composed?

A. It was composed of cars—flat cars and box cars.

56 20 Q. How many cars were there in the train?

A. That I cannot tell you—how many there were. I think that our load was generally twenty-six loads for a ten-wheel engine.

21 Q. Who was in charge of the train—on the engine?

A. Mr. Koller.

22 Q. Who was fireman?

A. I don't know his name.

23 Q. Who was the conductor?

A. Mr. Hays.

24 Q. Who was the other brakeman?

A. Frank Wrestler.

25 Q. What other men were employed besides these on the train?

A. Myself was all; there was five of us.

26 Q. Now, tell the jury what occurred—where was this train made up?

A. At Fort Wayne.

27 Q. Who helped make the train up?

A. I and Mr. Wrestler and the engineer and fireman and Mr. Hays; we were all interested in it.

28 Q. What time in the day was the train made up?

A. About 7 o'clock, I think; our time to leave there was 7.10.

29 Q. Morning or evening?

A. Evening.

30 Q. What time did you leave Fort Wayne?

A. Well, I suppose it would be about seven o'clock, or somewheres along there.

57 31 Q. What examination did you make, if any, of the cars and brakes and equipments and so forth at the time of making up the train or afterwards?

A. All I done was to see that the cars were coupled together, and that the pins were all down and such like as that, and the drawbars.

32 Q. What part of the train were you brakeing on?

A. I was the hind brakeman.

33 Q. Where was Mr. Wrestler brakeing?

A. He was brakeing ahead.

34 Q. What was the conductor doing?

A. Well, he gave us orders what to do.

35 Q. Who did you get your orders from as brakeman?

A. Mr. Hayes.

36 Q. Who was he?

A. Conductor.

37 Q. Now, after leaving Fort Wayne that night, just tell the jury what was done and what occurred that night.

A. Well, we proceeded along the track, as we generally did, and met our trains. I believe we were on time that night; passed number six at Kendallville; that was the regular meeting point at that time, I believe, and as we were going down to Rome City, it is down grade into town, I was out stopping the train for a water-tank and——

38 Q. (Interrupting.) For what reason did you stop?

A. To get water.

58 39 Q. Who ordered this stoppage?

A. Why, it was a regular stopping point. We always had to stop there, and the engineer called for brakes and Mr. Hays spoke and says: "They are going to get away from you," or something of that kind—that they were going to get away, and I was setting the brakes, and I had to climb on a car loaded with a saw-mill or machinery of some kind and it was pretty hard to get over, and I climbed down between the cars to set our end brake, and while setting it it gave way and let me fall between the cars.

40 Q. Now, just state what different kinds of brakes there are on the cars.

A. Well, there is an upright brake and an end brake; all ever I saw on a freight car.

41 Q. Now, just explain to the jury what an end brake is and what an upright brake is.

A. They are both end brakes, but one is what we call an upright brake.

42 Q. How is an upright brake operated?

A. From the top of the car.

43 Q. Where is an end brake operated?

A. From off the platform.

44 Q. Now, just show the jury where the brakeman must stand to operate an end brake on a car.

A. He must stand right on this platform. (Indicating on a model car.)

45 Q. Show the jury how the brake is applied by the brakeman.

59 A. By catching hold of the brake and turning it that way (illustrating), and holding this dog against this rachet-wheel on the lower side.

46 Q. How much force is it necessary or how much power is it necessary to apply to the wheel in order to set the brake there?

A. The brakemen generally set them as tight as they can.

47 Q. How is that done?

A. You have to swing your weight on it.

48 Q. Now, explain to the jury what occurred on the night of the 27th of June, when you attempted to set the brake—the end brake on the car that you have just spoken about.

A. This thing (indicating) gave way and let me fall.

49 Q. Explain to the jury what gave way.

A. This rigging here (indicating), I suppose it was. I had hold of this (indicating).

50 Q. You had hold of what?

A. This wheel (indicating).

51 Q. Do you know how much of it gave way?

A. No; I do not. I did not examine it.

52 Q. What became of you after it gave way?

A. I fell on the track and a wheel passed over me.

53 Q. How were you injured?

A. By its crushing my foot.

54 Q. Which foot?

A. My left foot.

60 55 Q. Now, just tell what part of your foot was crushed and how much.

A. The flange of the wheel just caught my heel about in that shape (illustrating), and it cut it off. The skin held it together right across there (indicating), and the body of the wheel passed over the ankle-joint. That is the way they told me. I did not see it—not close enough to make an investigation. I know I went to step—to crawl up the bank—and my foot turned over and I could not stand on it.

56 Q. After falling down between the cars what did you do?

A. Why, I tumbled down the bank there, I suppose, five or six feet to the edge of the water and caught hold of a telegraph pole and got part of the way up the bank and there was a gentleman came to me.

57 Q. Who came to you?

A. I don't know the man's name; I think he was attending bridges there at that time.

58 Q. Who did you see after you were crushed by the car that night?

A. I cannot hardly recollect—Mr. O'Rourke and Mr. Hays.

59 Q. Which Mr. O'Rourke?

A. The superintendent.

60 Q. And Mr. Hays?

A. Yes, sir.

61 Q. Who was Mr. Hays?

A. The conductor.

62 Q. Who else was there?

61 A. That is all that I can recollect of seeing. There was several around there—strangers, but I did not know them.

63 Q. Where were you taken that night?

A. Into the depot.

64 Q. And from there where?

A. To a tent up on the raise, about fifty yards east of the depot.

65 Q. How long did you remain in the tent?

A. I remained there until about ten o'clock the next day.

66 Q. What physicians were called in, do you know?

A. Dr. Gilbert, of Kendallville, and Dr. Teal, of Kendallville, and Dr. Wilson & Dr. Green and Dr. Williams, of Rome City.

67 Q. State what was done there after the physicians came in, if you know.

A. The first thing I recollect of after I was carried into the depot they brought me to in the morning and my leg was amputated. They kept me under the influence of chloroform from the time it occurred until the surgeons came and amputated it.

68 Q. You do not know anything at all, then, about what was done that night?

A. No, sir.

69 Q. How long did you remain at Rome City and at whose house did you remain?

A. I remained there until some time in July—towards the last of July—and I remained with David L. Mason.

62 70 Q. What physician attended you during the time you were there?

A. Dr. Gilbert & Dr. Green and Dr. Williams.

71 Q. How long did you say you were at Mr. Mason's house?

A. Until the latter part of July.

72 Q. From Mason's where did you go?

A. To my home in Ohio.

73 Q. How long before you were able to be about?

A. Well, I was out in August some time on crutches.

74 Q. How long before you were able to do work of any kind?

A. Well, I believe it was in the last of December that I went back to run baggage awhile on the road; that was the first labor I done.

75 Q. This same railroad?

A. Yes, sir.

76 Q. In what condition is the track, as to grade, near Rome City?

A. Well, it is pretty rough—that is, up and down.

77 Q. Which way does the grade run from the city?

A. It runs into the city both ways; down grade both ways.

78 Q. How was your train going, up or down grade, when you were hurt?

A. Down grade.

79 Q. What knowledge, if any, had you of the condition of this brake, or of any defects in this brake at the time?

63 A. I did not have any. I was in the habit, when I was setting these end brakes—I never liked to use them very well, but when I set them I generally looked pretty close to see if there were chains on them and every thing that way.

80 Q. Had this brake a chain on it?

A. Yes, sir.

81 Q. What was the condition of the night, as to being dark or otherwise?

A. Well, I most forget, but I don't think there was any moon. I think it was cleverly dark.

82 Q. About what time in the night did this accident occur?

A. Somewheres about ten o'clock; between ten and eleven.

83 Q. Do you know of your own personal knowledge what the number of that car was?

A. Why, it was 1397, Union Line.

84 Q. Do you know that of your own knowledge?

A. That was marked on my switch-card by Mr. Hays; I have the switch-card yet. That is how I learned that that was the car. I knew nothing myself of my own personal knowledge.

85 Q. Then you need not give that. You may state how many times before, if at all, you had set that brake—that particular brake?

A. I had never used it before.

86 Q. How many times, if at all, had you seen that car before that night?

64 A. I do not know that I ever saw it before, previous to that night.

87 Q. What knowledge, if any, had you of any defect in either the construction of the brake or any weakness or other defect in the brake?

A. I did not have any knowledge of it.

88 Q. Now, just tell the jury what caused you to fall down between the cars.

A. By the brake giving way.

89 Q. What amount of compensation did you give to the doctors for their attendance upon you? How long did the physicians attend you after you left Rome City?

A. You mean after I went to Ohio?

90 Q. Yes, sir.

A. Why, I had a doctor for a couple or three weeks, and then I got so that I could be out on crutches, and I took a backset, and my leg gathered, and it had to be opened, and I had a doctor then.

91 Q. What doctor had you then?

A. Dr. Leonard and Dr. Wilson and Dr. Dow, of Belle Center.

92 Q. How long did the physician attend you while at Rome City?

A. He attended me until I left there.

93 Q. What wages were you receiving from the railroad company as a brakeman?

A. I was receiving two dollars and ten cents a day, or a trip north from Fort Wayne.

94 Q. What was a trip?

65 A. Two dollars and ten cents a trip from Fort Wayne to Grand Rapids.

95 Q. What was a trip?

A. From Fort Wayne to Grand Rapids.

96 Q. How often did you make that trip during the month?

A. I cannot say how often; frequently.

97 Q. State to the jury about the number of times.

A. I generally got in good time; once in a while I lost two or three days in a month.

98 Q. How often was that train expected to make that trip?

A. That was a regular train.

99 Q. Daily?

A. Yes, sir.

100 Q. How many trips a month did that train make?

A. Well, I cannot say.

101 Q. State as near as you can.

A. It was a daily train; sometimes it would not be run; it was on the time table as a regular train every day, and some months have thirty days and some have thirty-one.

By the COURT:

102 Q. Then you would make thirty trips in a month if there was thirty days?

A. Sometimes we did and sometimes we didn't; we run some Sundays as well as any day, but sometimes we were "*m*illed" and did not go.

66 By General KENNEDY:

103 Q. How many times in the month did your train run?

A. I suppose we would make twelve round trips in the month; that would be twenty-four single trips; we would do that anyway, I suppose.

By the COURT:

104 Q. Was your two dollars and ten cents paid for the round trip or a single trip?

A. For a single trip.

By General KENNEDY:

105 Q. Four twenty for the round trip?

A. Yes, sir; something about that, as near as I can recollect. Since I come to think of it, I believe it was four dollars and ten cents

for the round trip. It has been so long I have almost forgotten it, but I think that was it.

106 Q. How much have you expended in the way of nursing and physician's bills, and so forth, and for medicines, and so forth?

A. Well, I have receipts and you can count it up. I cannot tell myself; I have not figured it up.

107 Q. You have the receipts?

A. Yes, sir.

108 Q. Have you them here?

A. No, sir; they are at the hotel.

109 Q. Can you tell how much you paid each one?

67 A. I can tell nearly what I paid.

110 Q. Give to the jury what you paid them?

A. I gave Dr. Gilbert——

Mr. CHAPIN: May it please the court, we object to any testimony as to what he may have paid the physicians. They are only entitled to recover reasonable compensation, and it does not follow that because he paid a physician a particular sum that he can recover it.

The COURT: I think he can state how much he paid.

To which ruling of the court the defendant at the time excepted.

111 Q. Just tell the jury how much you paid those physicians.

A. I paid Dr Gilbert of Kendallville $70, and Dr Green of Rome City, I paid him $25, and Dr. Williams, $12; and I paid Dr. Wilson a small bill—I think it was three and a half or four dollars—for medicines.

112 Q. What other bills did you pay?

A. I paid Dr. Mason $35 for a room, I think.

113 Q. What was that for?

A. For room and board, and so on; and I paid a nurse $25, besides paying his expenses to Ohio; that was six or seven dollars more.

114 Q. What else did you pay?

68 Then I paid doctor bills at home to the amount of about $25.

115 Q. What medicines, if any, did you purchase outside of this?

A. That was included.

116 Q. What doctors at home did you pay?

A. Dr. Dow and Dr. Wilson and Dr. Leonard.

117 Q. How much did you pay each one of them, do you remember?

A. I think I paid Dr. Leonard $10; I have his receipt; and Dr. Wilson, $5; and Dr. Dow, $10, I think.

118 Q. And what for nursing and attention, outside of physicians?

A. Well, as I said before, $23 to Mr. Williams for nursing, and I paid his expenses besides that to Ohio—six or seven dollars.

119 Q. When you went home?

A. Yes, sir.

120 Q. What ability have you to perform work now?

A. Well, I have not a very good ability.

121 Q. What kind of work can you do?

A. Oh, I can tinker at most anything. I cannot do a good day's work at anything I go at; there are some things I might do and some I could not.

Cross-examination:

Questions by Mr. CHAPIN.

122 Q. Is that brake there that is leaning against the desk the style of brake that was on the car that gave way?

69 A. Well, it is an end brake, and that is what was on the car; it is the same style. I do not know as it is exactly like it.

123 Q. According to the best of your recollection, was the brake constructed in that way?

A. I think it was; but I did not notice that the one that broke had that fastening to the car there (indicating). I did not notice that. I had not time to notice it, and I did not think about it.

124 Q. Now, do you know whether this car was a Grand Rapids and Indiana Railway car or whether it was some other company's cars?

A. From my own personal knowledge, I do not.

125 Q. I see that you have averred in your complaint that it was a Union car. What do you know about that?

A. Why, just from what was told me; that is all I know about it.

126 Q. You helped make up the train at Fort Wayne?

A. Yes, sir.

127 Q. Do you recollect of putting this car into the train?

A. I do not; no more than any of the rest of the cars.

128 Q. Do you remember whether there were any other cars of that construction in the train?

A. There were other cars with end brakes in the train.

129 Q. I mean a brake constructed as this one, with the wheel at the side?

70 A. Yes, sir; there were.

130 Q. There were other cars of that construction?

A. Yes, sir.

131 Q. Was not that a usual thing, to have cars of that kind with brakes manufactured and put on the car in that way?

A. I saw a good many of them when I was braking.

132 Q. On your trains?

A. Yes, sir.

133 Q. And you had used them, had you?

A. Yes, sir.

134 Q. You say this train was made up in the yards of the company at Fort Wayne at about seven o'clock?

A. Yes, sir; somewheres about there.

135 Q. Your leaving time, I believe, is seven o'clock and ten minutes?

A. I think it is somewheres close there.

136 Q. I understood you to say you left on time, you thought, that night?

A. Yes, sir.

137 Q. Then the yard at which the train was made up was east of Fort Wayne, was it not—east of the depot?

A. Yes, sir.

138 Q. Tell the jury about how far east.

A. Well, I presume it is a mile; it is hardly a mile; it is a mile from the depot, I think.

139 Q. Now, the yards there are what are known as the
71 Pennsylvania Company's yards, are they not—the yards where the train was made up?

A. I cannot tell you.

140 Q. The Grand Rapids road, in coming from the south, I will ask you if that don't strike the Pittsburgh, Fort Wayne and Chicago road at a station called Adams, and then switch on to the Pennsylvania Company road, and from there up use the Pennsylvania Company's track. How is that; is that so?

A. Yes, sir.

141 Q. That is the road?

A. Yes, sir.

142 Q. How far is Adams from the depot?

A. I don't know, but I think it is about four miles; I am not positive.

143 Q. And then it would be four miles east or southeast, as the road runs—a little to the south?

A. Yes, sir.

144 Q. The yard where you made up the train was a mile east from the station?

A. Yes, sir; I am counting Adams from the depot.

145 Q. Do you say that you don't know that those yards used there were the Pennsylvania Company's yards?

A. I don't know how they are connected nor who owns the yard. We got our train out of that yard.

146 Q. You and the other brakemen and the conductor made up the train, did you?

A. Yes, sir; I think the conductor was there sometimes; he didn't go in the yard, he went to the office.

72 147 Q. Now, how were trains made up; was there a switch-engine, or did you use the engine that hauled your train?

A. We used the engine that hauled our train.

148 Q. This car was where you found it in the yard?

A. Well, there was no switching done that night; I think the train was together and I think it was about the fourth car from the end—this car—I think it was the third or fourth car or somewhere along there; I cannot say exactly.

149 Q. How long did it take you to make up your train that night?

A. I do not think it took very long; I don't think there was any shifting to do.

150 Q. Give us an idea how long it took.

A. I cannot tell how long—ten minutes; it may have been longer or it may have less.

151 Q. Do I understand that the train was all ready and the cars were already standing upon the side track in line, so that all there was to do was just to couple them together and hitch your engine to them and pull out?

A. That night I do not believe there was any switching; I think that was all; I do not think there was anything else done.

152 Q. Now, whereabouts in this train was this car?

A. It was at the rear end of the train.

153 Q. How far from the caboose; the caboose was on the rear end?

A. Yes, sir.

154 Q. How far was it from the caboose?

73 A. It must have been the third or fourth car from the caboose.

155 Q. At which end of the car was this brake that gave way?

A. At the end next to the caboose—the end toward the caboose; it was not next to it.

156 Q. Do you recollect whether these cars were coupled together, or did you couple them after you went down there to make up your train?

A. There was some coupled. We had some coupling to make, I know.

157 Q. Do you know whether this car was coupled onto the forward or rear end of it, or whether you coupled it there?

A. I cannot say.

158 Q. What kind of a car was there immediately in the rear of it towards the caboose?

A. A box-car.

159 Q. Was there any flat cars between that car and the caboose?

A. I think not.

160 Q. They were all box-cars?

A. I think they were. The first car might have been a flat car, but I am pretty positive it was a box-car.

161 Q. Were there brakes on these cars between that car and the caboose?

A. Yes, sir.

162 Q. What kind of brakes were on those cars?

A. They were uprights and side brakes, too.

163 Q. By a side brake you mean one like this?

74 A. Yes, sir.

164 Q. Did each one of those cars have two brakes—one at each end?

A. Well, I think not; I know there was one opposite the one that I got hurt on, for I recollect of setting it up.

165 Q. Do I understand that each one of the cars had one brake at least upon it?

A. Yes, sir.

166 Q. But whether they all had two brakes or not you do not recollect?

A. No; I do not.

167 Q. Well, this particular car upon which this brake was; were there two brakes upon that car?

A. Yes, sir.

168 Q. Is there on the model that you have before you?

A. Yes, sir.

169 Q. Your leaving time from the depot was seven o'clock and ten minutes?

A. I think from the yards or about that. I will not say positively. It was about seven o'clock.

170 Q. What time did you go down the yard to get your train?

A. I generally went down pretty early. I went with the engine that went down and hooked onto our train, and when our leaving time came we pulled out—sometimes not until after it.

75 171 Q. When you speak about "early" do you mean a half hour or an hour before you left?

A. I have been there two hours before we left.

172 Q. I am speaking about this particular night.

A. I know I was down there and had changed my clothes and went up to the engine. After the train came I know the conductor came and told me what tracks to go on, but I don't recollect any more.

173 Q. Tell the jury, according to your best recollection, how long it was before the train started out that you went down there.

A. I cannot say. I do not recollect. I have no recollection about that.

174 Q. Would you say an hour?

A. Oh, it was not an hour, I know.

175 Q. Would you say a half hour?

A. I don't believe it was that long. I don't believe it was over twenty minutes.

176 Q. You were the rear brakeman, I understand?

A. Yes, sir.

177 Q. When the train started out on what part of the train were you?

A. I was standing on the rear end of the train on the top of the car.

178 Q. On the caboose?

A. No, sir; on the car next to the caboose. It was along towards the caboose some place.

179 Q. This was the 27th of June, was it?

A. I think it was; yes, sir.

180 Q. Was it a cloudy or clear day?

76 A. It was in the evening. I don't think it was moonlight. It was cleverly dark, I know.

181 Q. At that time of the year, on the 27th of June, at seven o'clock or half past six, the sun would not have set?

A. No, sir.

182 Q. Was the sun set when you went down there?

A. No, sir; the sun was up when I went to the yard.

183 Q. Then it was sufficiently light to see the cars?

A. Yes, sir.

184 Q. You could see the trains?

A. Yes, sir; we made the train up without a lantern.

185 Q. How long was it that evening before it got so dark that you could not see well; how far had you got on the road?

A. I don't recollect that at all.

186 Q. If you left at 7.10 you must have got out by Huntertown by the time it was dark?

A. I don't recollect.

187 Q. I understood you to say in your direct examination that you were in the habit of examining the brakes to see whether the chains were right and the brakes were right; did you do it that evening?

A. When I took hold of a brake I noticed to see whether there was a chain on it or not.

188 Q. Did you do that that evening?

A. Yes, sir.

189 Q. Did you look at the brake?

A. Before I set it I looked to see if there was a chain on it.

77 190 Q. Did you look at it before the train started?

A. No, sir.

191 Q. Did you look at any of the brakes to see whether they were in a condition to put on a train?

A. No, sir; I just glanced along to see if there was a chain on them, and if there was too much slack I took up the slack.

192 Q. Then I understand you that you made no effort to discover whether the brakes were out of order, except simply to notice whether the chain was on or not?

A. That was all.

193 Q. If there was any flaw in any brake here (indicating), you did not look to see whether there was or not?

A. No, sir.

194 Q. Do you think the castings that were on that brake were as heavy as this one?

A. I don't know; I will not say positively, but I do not think that the lower piece was attached; I think it kind of spread out here at the top, from what I could see of it.

195 Q. I do not exactly understand you.

A. I don't think this piece (indicating) was on it; I will not be positive, but I think it was just like a piece branching off there and set right onto that.

196 Q. Did you ever see one of those brakes with just simply this on (indicating), without the support there of that (indicating), or coming down in a sort of a Y in this way (indicating).

78 A. I don't know, but it seems to me the brake was differently arranged from that stirrup; I think probably it was arranged the way you mention.

197 Q. Was the stirrup of iron, and as heavy as that?

A. I don't know, sir; I didn't examine it to see about that.

198 Q. So you made no examination at all to see whether it was or not, to see whether the brakes were in order, except simply to look at the chains?

A. That was all; when I take hold of a brake to set it I kind of pull on it steady to see whether it was fastened.

199 Q. Now, in going out of the depot north to go to Rome City, when you get out about a mile west you leave the Pittsburgh, Fort Wayne and Chicago track to switch off on to the Grand Rapids road; you used the Pittsburgh, Fort Wayne and Chicago in going out west until you got beyond the branch, and then switched off onto the Grand Rapids road?

A. Yes, sir.

200 Q. When you got there to that junction your train stopped, did it not?

A. Yes, sir.

201 Q. Were there any brakes used there to make that stoppage?

A. None, I think; I think we just dropped down kind of easy. We might have set the caboose brake, or something like that,

79 but I do not recollect of any being set up.

202 Q. Then you left the Pittsburgh, Fort Wayne and Chicago Railroad track, and went onto the Grand Rapids track, and the track descends; there is a down grade after you leave the Pittsburgh, Fort Wayne and Chicago track, is there not?

A. It might be right at the track, but after you get a little piece from it you get off the steep grade.

203 Q. In leaving the Pennsylvania track is not the Grand Rapids track lower?

A. Yes, sir.

204 Q. Now, after you leave the Pittsburgh, Fort Wayne and Chicago track and go onto the Grand Rapids you go some 40 or 50 rods and then you come to the crossing of the Fort Wayne and Muncie road?

A. Yes, sir.

205 Q. There you make another stop?

A. Yes, sir.

206 Q. Now, I will ask you if you did not have to set the brakes in order to make that stop?

A. Yes, sir.

207 Q. Did you use this brake?

A. No, sir; it didn't require as many brakes to hold it.

208 Q. What brake did you use?

A. The caboose brake and the brake next to it—the brake on the car next to the caboose.

209 Q. Did you stop at Wallen that night?

80 A. Now, I cannot recollect.

210 Q. Did you stop at Huntertown?

A. Yes, sir.

211 Q. Did you side-track there?

A. I cannot recollect that.

212 Q. Did you stop at the water-tank just beyond Huntertown for water?

A. I think we did.

213 Q. In going from Huntertown to the water-tank there is another down grade?

A. Yes, sir.

214 Q. I will ask you if you did not not apply the brake there?

A. No, sir; not a brake that I was braking.

215 Q. Did you use but one brake?

A. Yes, sir.

216 Q. How many brakes did you use?

A. I used enough to stop the train.

217 Q. How many did you have to use?

A. I cannot say how many it was. I know I did not crawl down between any cars to set any brakes.

218 Q. Did you stop at La Otto?

A. Yes, sir.

219 Q. Did you use any brakes there?

A. Not very many; it is a little up grade.

220 Q. You had to come to a full stop there because you crossed the Eel River road?

A. Yes, sir.

221 Q. At Avilla you crossed the Baltimore road?

A. Yes, sir.

81 222 Q. Did you stop there?

A. Yes, sir.

223 Q. Did you use any brakes there?

A. I don't think we did, it is up grade.

224 Q. Did you stop at the station beyond—the Grand Rapids station beyond the Baltimore crossing?

A. No; I do not think we did; I will not say.

225 Q. Did you have any passengers that night?

A. I do not know whether we did or not; I don't recollect; there might have been and there might not have been.

226 Q. After you got beyond Avilla down a mile or two you have to go down quite a steep grade going north?

A. Yes, sir.

227 Q. Did you use brakes there?

A. I used the caboose brake to regulate the speed of the train.

228 Q. Did you use no other?

A. No, sir.

229 Q. How was it at Kendallville?

A. We stopped at Kendallville and passed number six there.

230 Q. In going down the hill from Lisbon did you use more than one brake there?

A. I don't think we did; we used enough to regulate the speed of the train.

231 Q. That is one of the steepest and heaviest grades on the road, is it not?

A. It is steep there.

82 232 Q. It is one of the heaviest grades on the north end of the road?

A. I guess it is among the heaviest.

233 Q. In going north you usually apply brakes there, do you not?

A. Yes, sir; you can regulate the speed of your train, though.

234 Q. Do you recollect whether you used this brake there or not?
A. No, sir; I did not use it.
235 Q. Then, — I understand you, you did not use this brake until you got to Rome City?
A. No, sir.
236 Q. When you were going down to the station at Rome City how many brakes did you put on?
A. I cannot tell, but I think that was the fourth or fifth brake that I set.
237 Q. Did you set the caboose brake?
A. Yes, sir.
238 Q. Did you set the brake on the first car?
A. Yes, sir; and the next brake was an upright brake, and the next brake was a side brake. I set it and then went to this brake. The next to the last brake I set was of that species.
239 Q. Then you went to this brake?
A. Yes, sir.
240 Q. Did you have your lantern with you?
A. Yes, sir.
241 Q. Did you have it when you went to set the brakes?
A. Yes, sir.
242 Q. Did you look at the brake to see whether it was in order before you applied it?
83 A. I just looked to see whether the chain was on it, and kind of eased up on it when I started to turn it.
243 Q. It was dark at that time, I suppose?
A. Yes, sir; it was about ten or eleven o'clock.
244 Q. In using your lantern to determine whether the chain was on the brake or not, you had to hold it down, didn't you, and take a side look at it this way (illustrating) to see?
A. No, sir.
245 Q. How did you look?
A. I catched hold and kind of tightened her up.
246 Q. You just tried it by the wheel?
A. Yes, sir; I felt it like this way (illustrating) with my hand— felt the chain.
247 Q. Then you didn't look; you merely did it by feeling?
A. I didn't take the lantern to see; I could see, of course, by the light, though.
248 Q. Which side of the brake were you standing on?
A. I was standing on the inside of it a little, very near straight with it.
249 Q. On which side, the right-hand or left-hand side, going north?
A. I was standing on the right-hand side of the brake, going north.
250 Q. You were using the brake?
A. The brake was on the right-hand side of the car.
251 Q. And you were on the east side of the brake?
84 A. I was on the same side. The brake was on the right-hand side.

By the COURT:

252 Q. How did you stand with reference to the brake, whether on the right or left hand side of it?

A. I stood very near in front of it—rather a little bit to the left of the brake, but very near in front of it. You have to stand a little to one side.

By Mr. CHAPIN:

253 Q. You stood right in front here (illustrating with reference to the brake exhibited in court)?

A. A little to the left. You have got to catch the brake in this way (illustrating), and throw your hand onto this dog to throw it down so that the ratchet-wheel will catch.

254 Q. You turned it that way and stood on this side; you don't turn the brake towards you?

A. Yes, sir; the wheel would come around this way.

255 Q. You didn't turn it this way (illustrating)?

A. No, sir; I turned it that way (illustrating).

256 Q. From you?

A. Yes, sir.

257 Q. And hold your hand upon the dog on that side?

A. Yes, sir.

258 Q. How wide was that platform?

85 A. Oh, I suppose it was along about eight or ten or twelve inches; somewhere along there. There was room enough for a man to stand on it.

259 Q. If I understand you right you had your left hand upon the dog and your right hand pulling the wheel of the brake?

A. Yes, sir.

260 Q. What part of the brake gave way?

A. I cannot tell you. I know it came off enough and sufficient to let me fall. I could not see what it was.

261 Q. Where was your lantern at that time?

A. Now, suppose this (indicating) was the car and that (indicating) the brake on it, and here (indicating) is the car right behind. Now, my lantern was sitting right on this platform behind where I was standing—kind of to the left of where I was standing—and the light reflected right down on the brake. I did not like to carry a lantern down in there with me, because it took some trouble to hold the lantern, and I could see just as well with it up there.

262 Q. Now, in going from the yards down to the crossing of the Wabash road, between the yard and the depot, you go down quite a steep grade there, do you not?

A. Well, it is considerable of a grade.

263 Q. Is it not just as heavy a grade as this one at Rome City?

86 A. Oh, no; I don't think it is. It never required so much power to stop them there.

264 Q. After you got up the hill, in going from Avilla towards the Baltimore crossing, didn't you have quite a heavy down grade there?

A. I don't understand you.

265 Q. After you left Swan and approached the Baltimore crossing south is there not a heavy down grade to the Baltimore road?

A. No; I think it is an up grade.

266 Q. Is it not so heavy a down grade there that your train hardly ever stopped there because of the difficulty of brakeing and stopping?

A. Why, I don't know what you mean. It does not require any brakes to stop for the Baltimore and Ohio crossing at Avilla. It is a hard grade to get up.

267 Q. Where the brake gave way did the wheel go down with you?

A. I didn't look for the wheel; we all went together; I knew it gave way; I had hold of it and it gave way, and I fell between the cars—kind of out to one side of them; there was not much time to look after the wheel.

268 Q. Whereabouts at Rome City were you signalled to put the brakes on?

A. Well, it is a regular stop, and we were generally out at regular stops to catch our train. We did not want to run past the crossing or past the tank. We generally aimed to stop right at the tank if we could.

87 269 Q. You say it is a pretty heavy grade from there down?

A. It isn't to the track, but just about the depot; there it starts off, and after that it is a little more level.

270 Q. Where did you first apply the brakes there that night?

A. Well, I suppose the train or engine was just going over the grade; that is where we generally get them, when the train was just starting over the grade.

271 Q. Did you apply all the brakes between the caboose and this one before you applied this one?

A. Yes, sir.

272 Q. How many brakes did you set?

A. I cannot say; I think it was either three or four—the cars between the caboose and where I got hurt. I think it was either the third or fourth car that the brake was on. I know I set up enough to stop the train. I was afraid they would get away from me and I didn't want to run past, because it is considerable trouble to back up, and then there was a section following us, and there is danger of running into each other when they are following close.

273 Q. Do you know whether this car that you had this brake upon it was fastened up or not—I mean the doors?

A. No; I don't know.

274 Q. How long had you been upon the road at that time?

88 A. I went on in February.

275 Q. And had acted as a brakeman from that time?

A. Yes, sir.

276 Q. These Union cars that you speak of, they were frequently used on that line, were they not?

A. Yes, sir.

277 Q. Did you ever attempt to examine the brakes to see how they were constructed?

A. No, sir.

278 Q. You have plenty of time to do it—to examine the brakes?

A. Yes, sir; but I did not think it was my duty.

279 Q. You could have examined that brake that night, if you had felt disposed to, before the train went out?

General KENNEDY: May it please the court, we object to that as immaterial. We do not think it is material whether he had time or whether he could have examined the brakes or not.

The COURT: That depends entirely upon what the custom of the road was. If it is part of the brakeman's business, then it is material; if it is not part of the brakeman's business to examine the brakes, then it is immaterial.

89 Mr. CHAPIN: May it please the court, we claim that it is part of the brakeman's duty to examine the brakes at all times.

The COURT: If you establish that as a part of his duty to the company, then it is material. I don't know whether that is the fact or not. If it is the duty of his employment, and it came within the scope of his business in the exercise of his duty, then it would be material. All that is ordinarily left to the jury. He has stated what examination he did make.

The WITNESS: I never was instructed to examine them by anybody.

Mr. CHAPIN: We claim that, as a matter of law and incident to the duties of his particular occupation, it was his duty, so far as time and opportunity presented, for him to examine for himself, for his own self-protection, the machinery he used, especially the brakes, and see whether they were in order or not; and, then, may it please the court, I want to examine him as to the fact as to whether brakes were not frequently getting out of order, so as to show that it was necessary to examine the brakes freely.

The COURT: You may examine him on that latter proposi-
90 tion. Of course, it would be a plain proposition that if the brakeman, in the course of his duty, did find a brake out of order it would be his duty to report it.

280 Q. Did you have a copy of the rules and regulations of the company—a printed copy?

A. Yes. sir.

281 Q. Do you remember that you examined the rules?

A. Why, I have looked over them.

282 Q. I will ask you if you were not aware of its being a rule that it was the duty of brakemen to examine the brakes on their trains and see that they were in safe and proper condition for use?

A. Well, I do not mind much about it, but I never was cautioned by any of our conductors or anybody to examine them. I knew that if we saw a break out of order we generally repaired it.

283 Q. It was a frequent occurrence that brakes were getting out of order?

A. It was on flat cars.

284 Q. Or even on upright cars?

A. They were hauling a good deal of lumber on flat cars, and they were more or less knocked loose. We paid particular attention to them when we used them, or at least I did when I was using them, for they were liable to be knocked off.

285 Q. You frequently found broken brakes on the flat
91 cars which were loaded with lumber, and on the box cars which were next to the flat cars?

A. Yes, sir.

286 Q. It was no unusual thing for a load to get shifted forward or backward so as to go against a box car and hit the brakes?

A. I have seen it that way.

287 Q. And in such a case the brake would get out of order?

A. Yes, sir.

288 Q. Then was it not your habit to examine and see what the condition of the brakes was, and to see whether the brakes were in order or not?

A. Well, I examined them so far as I knew. I was always careful about setting a brake, but the particular safety about it was to see whether the chain was in good order.

289 Q. Not the chain, because if the chain was out of order that would simply be that you could not brake, because the chain was lost; but how was it about the apparatus of the brake itself—the wheel and arm?

A. I have never examined them any more than to take hold easy that way (illustrating).

290 Q. You testify that you did not examine the brake itself, the wheel and the arm, to see whether it was in good order and to see whether the bolts were in?

A. No, sir. I never examined only what I have said. I have taken hold kind of easy, in starting them, to see whether
92 there was anything wrong with them or not. I never took a lantern and went to see if the bolts were out, or anything of that kind.

291 Q. If it was day time, how did you do?

A. If we had to stop I set up the brakes.

292 Q. Now, don't you know it was the standing rule of the company for brakemen to exercise particular care? Was it not understood by the brakemen themselves that they must exercise particular care in using the brakes?

A. To keep your train under control and so on.

293 Q. I mean in the use of the brake itself?

A. I don't recollect of ever seeing such a rule.

294 Q. This road is what we might term in one sense a lumber road, is it not—that is, a large portion of the freight hauled from the north is lumber?

A. Yes, sir.

295 Q. And that lumber is loaded on flat cars and box-cars, and it was bad freight to carry, so that frequently the load on the flat

car would jam forward and jam through the ends of the box-cars; didn't that occur frequently?

A. I believe I have seen it where it jammed into a car.

296 Q. So that the brake even on box-cars would be disarranged, the lumber would push forward or backward and push against the brake and bend it over or put it out of order; wasn't that a very frequent occurrence?

A. Yes, sir; on flat cars.

93 297 Q. And sometimes they would get the brakes out of order on box-cars?

A. I don't recollect of any occurrence of that kind.

298 Q. I will ask you if you didn't know and if you didn't understand that it was your duty for your own self-protection to see that those brakes were in proper order?

General KENNEDY: May it please the court, we object to this question as incompetent, improper, and irrelevant.

The COURT: I think I will overrule the objection. He may answer the question.

To which ruling of the court the plaintiff at the time excepted.

A. I did not consider it my duty; if I had seen anything wrong with the brake I, of course, was to fix it or keep away from it.

299 Q. For your own self-protection you were to look?

A. No; I never done that particularly; I always looked out for my train; I always thought about the train; I aimed to keep the train under control; if I saw anything wrong about a brake of course I would look if I was going past it.

300 Q. You took no pains to do it?

A. No, sir; I did not think it was my duty to do it.

301 Q. And even your sense of self-protection didn't tell you it was your duty to do it?

94 A. I didn't make any examination of the brakes to see if they were very strong or anything.

302 Q. You were in the habit of using these brakes by putting a stick in the lever, were you not?

A. No, sir; I never used a stick but once or twice in my life.

303 Q. Didn't you use a stick in the brake that night?

A. No, sir; I did not.

By General KENNEDY:

304 Q. I will ask you again how long you have been a citizen of Ohio?

A. I was born in Ohio and raised there. I never was out of the State until I went to Fort Wayne to railroad.

305 Q. Where was your home when this suit was brought?

Mr. CHAPIN: Excuse me, General Kennedy, there is one point I had forgotten; with your permission I will ask the witness about it now.

General KENNEDY: Very well.

By Mr. CHAPIN:

306 Q. You spoke about coming back upon the road and doing something about the baggage?

A. Yes, sir.

307 Q. What were your duties?

A. I was train baggageman.

308 Q. How soon did you come back upon the road?

95 A. I think it was in December some time; I will not be positive.

309 Q. The December following?

A. Yes, sir.

310 Q. And how much did you earn—how much were you paid for your services?

A. I don't recollect; I think I was on about four weeks, or somewhere along there.

311 Q. What did you get by the month or week or trip for your services?

A. Well, sir, I can't tell you; I have forgotten how much I got for a trip.

312 Q. Why don't you recollect that as well as you do about what you got for brakeing?

A. I was brakeing longer than that.

313 Q. But the other was more recent; I didn't pay much attention to it; I believe it was $1.60 I got; I don't recollect.

314 Q. You say you went on in December?

A. Yes, sir.

315 Q. And you were on the road for how long?

A. Oh, I can't tell you; three or four or five weeks; somewhere along there.

316 Q. What have you been doing since that time?

A. Well, I have been working in a mill some; I have not been doing anything most of the time.

317 Q. What kind of a mill?

A. A flouring mill.

318 Q. What did you do in the flouring mill?

A. I did what I could; I was a kind of "roustabout."

96 319 Q. What did you do?

A. I helped take in the grist and exchange the grist. I didn't do very much.

320 Q. How much could you earn at that; how much did you earn?

A. Well, I don't think I earned anything.

321 Q. How much did you get?

A. I had an interest in it.

322 Q. What were your services worth?

A. Well, I can't tell; I don't think we made anything, to be honest about it.

323 Q. That means you did not make anything because your business was not a paying business. What were your services worth? Suppose you had had to hire a man to do what you did, to do your work, what was it worth?

A. Well, there is a man working in my place now, doing just as much again as I did, for a dollar a day and boarding himself.

324 Q. How long did you work in the mill?

A. Well, I didn't work very long or very steady. I had an interest in it and I was there watching it.

325 Q. Are you still engaged in the milling business?

A. Yes, sir.

326 Q. A flouring mill?

A. Yes, sir.

327 Q. Where is that?

A. Belle Center, Logan county, Ohio.

328 Q. Were you at work in the mill at the time this action was commenced?

97 A. No; I had not gone into the mill then; I went into the mill on the 4th day of July, a year ago.

329 Q. That would be the 4th of July, 1882?

A. Yes, sir.

330 Q. What were you doing from the time you left the Grand Rapids road up to the time you went into the mill?

A. I was loafing.

331 Q. Why didn't you stay in the employ of the railroad company?

General KENNEDY: We object to that, may it please the court. We do not think it is material or competent.

The COURT: The objection is sustained; to which ruling of the court the defendant at the time excepted.

332 Q. I will ask you if you didn't get forty-five dollars a month as baggageman while you were in the service of the railroad company?

A. I think we were paid by the trip; it might have run that, and it might have run over that.

333 Q. You were paid by the trip?

A. Yes, sir.

334 Q. How many trips did you make a month?

A. I don't know. I laid off a few times.

335 Q. The train ran daily?

A. Except Sunday.

336 Q. Then there would be twenty-six trips a month,

98 unless you laid off?

A. Yes, sir.

337 Q. At one dollar and sixty cents a trip?

A. Yes, sir; I think that is the way of it.

Re-examination—questions by General KENNEDY:

338 Q. I was just asking you about how long you had been a citizen of Ohio.

A. Since 1860; I was born in 1860.

339 Q. Have you ever been a citizen of any other *city* than Ohio?

A. Well, I don't think I have. Well, I have lived in Indiana.

340 Q. Have you ever been a citizen of Indiana?

A. No, sir; I never was.

341 Q. Of what State were you a citizen at the time of the beginning of this suit?

A. I was in Ohio—a citizen of Ohio.

342 Q. What was your age at the time this suit was commenced?

A. Well, I don't know exactly when the suit was commenced. I was not present.

343 Q. On July 14th, 1882. Of what State were you a citizen at that time?

A. I was in Belle Center, Ohio.

344 Q. Of what State were you a citizen?

A. Ohio.

345 Q. And at that time how old were you?

A. Twenty-two.

346 Q. In running up or down grade on a railroad or on a
99 level track, where is it necessary to set most brakes for the purpose of controlling a train?

A. I don't hardly understand you.

347 Q. Where is it necessary to use or set most brakes on a railroad train—on a level track, going down grade or going up grade?

A. Going down grade.

348 Q. Now, as to the track at Rome City or near there, approaching Rome City, how many brakes was it necessary to set that night in order to stop the train?

A. Well, I think I had four or five brakes set somewhere along there, and then I didn't stop the train.

349 Q. How many of these end brakes did you operate that night?

A. One; and I started to operate another.

350 Q. One in addition to this one?

A. Yes, sir.

351 Q. Where was that brake situated?

A. In the end of the car, about the third or fourth car from the caboose.

352 Q. Next to this car or farther away from it?

A. It was the next car to it.

353 Q. Which brake did you set first, the other one or the one that broke?

A. The other one, of course.

354 Q. Now, about the lantern. The platform on the car that you were standing on, how did it compare with the platform on the end of this little car, as to construction?

100 A. It was about the same, I think; it is a platform to stand on.

355 Q. What are these little projections called on the car?

A. Deadwood or bumpers.

356 Q. What are they generally made of?

A. Iron.

357 Q. How large are they as compared with the platform?

Q. They are of different sizes; some of them are larger than others.

358. On the car in question what recollection, if any, have you as to the platform and deadwoods?

A. Well, I haven't any of the deadwood. I knew that the platform was large enough to stand on—for a fellow to stand on it.

359 Q. Now, in making up a train and in going out with a train, what does the brakeman do with regard to brakes along the train? What sort of inspection do you give for the purpose of finding out the condition of the brakes, such as to use and such as not to use?

A. Our inspection generally comes by the use of them.

360 Q. How often had you used the brakes that night along on that train?

A. Oh, I can't tell you how often we had used them. We had stopped several times.

361 Q. What inspection does the brakeman make, if any, for the purpose of finding out what brakes are fit to use and what are not fit to use?

101 A. Why, in the yard, in going out, I generally examined the chain to see whether there was any slack in it.

362 Q. Did you examine any other part of the brake—the wheel or anything?

A. No, sir.

363 Q. In speaking about the mill—in what manner are you running a mill, or do you own a mill?

A. My father owns all with the exception of what I own.

364 Q. Just state to the jury how you got possession of the mill and how you came to be occupying it.

A. My father gave me a one-fourth interest in it.

365 Q. An interest in the property or an interest in the profits?

A. In the property.

366 Q. When you run as baggageman what part of the time did you lay off from duty after you went back on the road?

A. I was off a couple of times, I know.

367 Q. For what reason?

A. My back was weak. I had strained my back—hurt my back some way in falling—and I could not stand the handling of the big trunks, and my leg was sore.

368 Q. What was the reason you quit working there?

A. Because I could not stand the labor.

And further the witness saith not.

102 NICHOLAS MARKS, a witness called for the plaintiff, being first duly sworn, testified as follows:

Examination-in-chief—questions by General KENNEDY:

1 Q. State your name.

A. Nicholas Marks.

2 Q. What is your business?

A. I am general foreman of the car department of the C., C., C. and I. railroad—Indianapolis division.

3 Q. Where are you located?

A. At Brightwood, Indiana.

4 Q. How long have you been engaged in the business?
A. I came here in 1881, in August.
5 Q. How long have you been engaged in railroading?
A. Since 1864.
6 Q. What has been your business from that time up, in the way of handling cars or otherwise?
A. Well, I have been working as a bench hand and building and constructing cars.
7 Q. And are you now?
A. I am general foreman of the car department of the Indianapolis division of the C., C., C. & I. railroad.
8 Q. What knowledge have you of the construction of cars with reference to this particular brake, called an end brake, I believe?
103 A. Nothing more than that they come in for light running repairs.
9 Q. How often and about how frequently have you seen these brakes?
A. About every day.
10 Q. How often have they been repaired under your supervision—about how often?
A. Not very often—they don't come in as a general thing.
11 Q. This particular brake? State whether or not it is used on your road.
A. Not on our cars; it is used on the Empire Line and Union Line.
12 Q. I mean on the C., C., C. & I. railroad?
A. No, sir.
13 Q. Now, just state to the jury how these—what is the proper construction of one of these brakes and how it is properly applied to one of the cars?

Mr. CHAPIN: We object to that. May it please the court, I cannot conceive what it has to do with this case.

The COURT: What do you expect to prove?

General KENNEDY: I expect to prove by this witness that the proper construction of these brakes is made by having an iron rim inserted in the woodwork, through which this brake is passed, and on the inside of that, in front of the rim, there is a washer, or should be a washer, and on the outside of that washer a pin going through a hole, and we say that this brake on this car was not con-
104 structed in this manner.

The COURT: Do you claim that that had anything to do with this accident?

General KENNEDY: We claim that there was not only a break of this (indicating), but that this (indicating) was defective.

The COURT: Had that anything to do with the accident?

General KENNEDY: That whole thing broke and pulled out.

The COURT: Let the witness testify; I cannot tell whether it will have any bearing or not until I hear it.

Mr. CHAPIN: I claim, may it please the court, that the evidence

will show that we were not the constructors of this car; it was a Union Line car, received by us in the course of transportation, and we had no means of determining how it was *in*structed without we took the car apart.

The COURT: All these things will enter into the question finally to be decided by the jury, with some little mixture of law.

To which ruling of the court the defendant at the time excepted.

14 Q. Then state how those are properly fastened to the car.

Mr. CHAPIN: May it please the court, I want to submit
105 another question: That the railroad, as a matter of law, are not bound to construct cars in any particular manner, and that they may constrnct them in any safe manner, or they may construct them unsafely if the party who hires knows the manner of their construction.

The COURT: I cannot—the court cannot anticipate a manner of that kind.

To which ruling of the court the defendant at the time excepted.

15 Q. Now, just tell how these cars were usually and properly constructed; explain to the jury how that (referring to the brake) is fastened on.

Q. My opinion is—how I found them constructed as a general thing—this brake rod runs through the car and there is a washer on the inside and it is fastened to this post (indicating), and then there is a split key put in through the shaft to hold the shaft.

16 Q. Now, explain how that washer is fastened, if at all.

A. It is immaterial whether it is fastened or not; it may be loose so that this pin was guarded, so that it didn't turn and wear against the wood.

17 Q. Of what use or value is that washer on the inside?

A. It is to guard against this motion; if it would grind against the wood you will naturally have a motion back and forth.

106 18 Q. And how does that operate in regard to its coming out or holding it there?

A. Well, I suppose it might hold it there and keep it from dropping out in case anything should break.

19 Q. Of what service was the washer and of what good is it; of what is it made?

A. It is made of iron; some are cast iron and some wrought flat iron, maybe a quarter of an inch thick.

20 Q. Now, of what is the pin that you put through this brake-rod made?

A. It is a wrought-iron body with a quarter or ⅜ of an inch split.

21 Q. Of what service is that pin?

A. It is to keep up the lat*t*eral motion—in other words, to prevent the brake from grinding and having a lat*t*eral motion and working back and forth.

22 Q. I will ask you about this arm (indicating). What do you call that?

A. That is a bracket.

23 Q. I will ask you if the brackets on all of these cars are made like that?

A. No, sir; there is some made with the support below forming a Y; that fastens on in this shape (illustrating); this (indicating) comes around and forms a brace below instead of above.

24 Q. This seems to have two braces above; are they all made that way?

107 A. As to that I cannot say.

25 Q. Of what service, if any, is the pin on the inside there with respect to keeping the brake-rod from pulling out?

A. It would naturally; if the pin was in there with a washer you could not pull it out.

26 Q. Suppose there was no washer on the end, no iron washer on the inside, and no pin on the inside, and the brake-rod was inserted in the end of the car, made of soft wood, pine or other material, what would be the result then?

A. As long as the bracket was all right the brake would be safe.

27 Q. Suppose the brake broke?

A. Then, of course, there would be nothing to hold the brake-staff from coming out.

28 Q. It would pull out?

A. Yes, sir.

29 Q. Now, a brake or crack of any kind in the bracket or wheel so that it would show a rusty crack—what inspection ought to be made for the purpose of discovering it?

Mr. CHAPIN: We object to that. May it please the court, we don't think it is competent, material, or relevant.

The COURT: It seems to me that is putting a good deal in the power of the witness.

30 Q. Suppose there is a crack in the outside or rim of the wheel or a crack in the bracket itself, would or would not an inspection of the wheel or bracket reveal it?

108 Mr. CHAPIN: I think I will object to that question, may the court please.

The COURT: I think he may state it. It is like asking the jury whether a thing that could be seen would be seen or not; but it seems to me until we get the nature of the particular injury here, the particular crack, and ask some man about that, it seems to me it is spending time needlessly.

General KENNEDY: Then, may it please the court, I will withdraw he question. That is all I want to ask the witness.

Cross-examination—questions by Mr. CHAPIN:

31 Q. I understand you that these brakes are constructed in two ways, in two different methods; some of them are perhaps something like that, making a branching "Y" here (indicating), and coming down this way, instead of having a straight arm.

A. Yes, sir.

32 Q. They are constructed in both ways, are they?

A. Yes, sir.

33 Q. Is one as strong and as effective as the other?

A. Yes, sir.

34 Q. And whether one is constructed this way or the other way there is no difference, so far as safety is concerned?

A. No, sir; they are safe.

35 Q. Now, this portion of the shaft of the brake (indicating) goes through the end of the car, does it?

109 A. Yes, sir; through one of the upright posts.

36 Q. Now, I will ask you to state if when this thing was bolted on here (indicating) the safety does not depend entirely on this (indicating), or, in other words, all the use that this (indicating) is, is to keep the shaft from lateral motion, and also as a bearing when the chain is around here (indicating)?

A. Yes, sir.

37 Q. That is all?

A. Yes, sir.

38 Q. Now, if this arm (indicating) bra-kes, would this shaft here (indicating), with a washer on it, passing through the board at the end of the car, add anything to its safety; would it not come down any way?

A. If the post had been worn enough to let it drop either one way or the other, then it would.

39 Q. When you have got the support here (indicating) broken, then you have got an arm here (indicating), with the chain drawn tight there, bearing down there (indicating), with only just what it has there in the end to hold it?

A. Then it would have to come down.

40 Q. Now, is it not the fact that this washer put on here (indicating) is put on for the purpose of keeping the key from wearing into the wood?

A. Yes, sir.

41 Q. And is this key put on there for anything more than to hold it in position and for the purpose of fastening it until

110 they can bolt this (indicating)? In other words, is this key put in for the purpose of adding any strength to the brake, or simply to keep it in its place until it is fastened?

A. It is put in for two reasons; it is put in when you put in the shaft to keep it up, and secondly, so as to keep it from pulling out in case that (indicating) should break, so that it would not drop down on the track.

42 Q. That is, to keep it from pulling out this way (illustrating)?

A. Yes, sir; pulling out straight.

43 Q. But if the chain was on here (indicating) and the draught was all downwards it would not keep it from pulling out; it would be simply a question as to whether the wood or this shaft was stout enough to bear the pressure?

A. Yes, sir; to bear the tension that was put on the chain. If your pin was not in it would naturally incline to work it out.

44 Q. Would not the entire pressure be right downwards upon the chain there (indicating), in this way; and could it get out when

the chain was there taut, until the wood gave way inside or the shaft gave way?

A. Not if the holes were perfectly straight and had not been worn any.

45 Q. So long as — in this place here (indicating)?

A. There is no particular wear of this wheel; but if you
111 have not the bushing in, the holes will wear very large.

46 Q. Did you ever see any bushing around this part of the shaft (indicating)?

A. No, sir.

47 Q. Then, the two objects for which that key is put on is for the purpose of holding it in place when they put it up, and to prevent it from pulling out in case this (indicating) would break? Is that what you say?

A. Yes, sir.

48 Q. Do you say that that latter part of it is correct; that it is for the purpose of preventing it from pulling out when the arm is broken?

A. Yes, sir.

49 Q. Would it add anything to the safety of a brake that was pulled so taut that the arm had broken off by having that key in there? Would not the brake come down anyway?

A. The brake would come down anyway.

Re-examination—questions by General KENNEDY:

50 Q. Explain to the jury what you mean by dropping down. Where would it drop down if it was keyed on the inside?

A. It would drop down at about an angle of 5 or 6 degrees; the chain would pitch well downward.

51 Q. As to dropping down, do you mean it would simply drop down against the car or to the ground?

A. It would drop up against the car—that is, the tension of the chain then would hold it.

112 52. Q. Where would the wheel or broken piece remain with the key on the inside properly fixed?

A. In the shaft.

53. Q. Where would the wheel stay—the whole thing—where would it remain?

A. If the shaft was not broke it would hang up against the car.

By Mr. CHAPIN:

54. Q. About how long do you say this key is that is put through?

A. I think it is $3\frac{3}{4}$ or 4 inches, or may be $4\frac{1}{2}$. It projects an inch on each side.

And further the witness saith not.

Whereupon, the hour of 5 o'clock having arrived, the court adjourned until to-morrow (Tuesday, December 4th, 1883), at 9 o'clock a. m.

TUESDAY, *December 4th*, 1883—9 o'clock a. m.

Court met pursuant to adjournment.

Present: The same as on yesterday.

The hearing of the evidence for the plaintiff was resumed as follows:

Deposition of witnesses taken in an action pending in the Randolph circuit court, wherein Osman Lisles is plaintiff and the Grand Rapids and Indiana Railroad Company is defendant, which said depositions were taken on behalf of the plaintiff at the time
113 and place in the notice in said cause given, which said notice is hereto annexed.

That the plaintiff was present at said taking of said depositions in person and by W. H. Thompson, his attorney, and said defendant was present by Allen Zollars, his attorney.

DAVID L. MASON, of lawful age, being first duly sworn by me to testify the truth and nothing but the truth in relation to said cause, deposed as follows, to wit:

Q. State your name, age, and place of residence.

A. David L. Mason; age, thirty-four years; Rome City, Noble county, Indiana.

Q. How long have you lived in Rome City?

A. Three years.

Q. Are you acquainted with Osman Lisles?

A. Yes.

Q. Have you any knowledge of his having received any injury or injuries any time?

A. Yes, sir.

Q. If so, when?

A. On the 27th of June, 1881.

Q. State where he received those injuries, if you know.

A. South of the depot, on the Grand Rapids and Indiana railroad.

Q. At what time in the day or night was these injury or injuries received?

A. About a quarter till eleven.

Q. Eleven at night or in the day time?

A. Night.

114 Q. Where was Osman Lisles when you first saw him after he was hurt or injury received?

A. He was in the Grand Rapids depot at Rome City.

Q. State what injury or injuries, if any, the said Osman Lisles had sustained at or near the time you said you saw him at said depot.

A. He had his foot mashed—his left foot.

Q. You may state, if you know, how or by what means he had received this injury.

A. I did not see him till he was carried into the depot.

Q. You may state whether or not there were any car or cars at

or near said depot when you saw the plaintiff there at the time he was injured; and, if so, state what they were.

A. The whole freight train stood there.

Q. State what you may know, if anything, as to whether the plaintiff was at the time he received said injury engaged in any employment in connection with said freight train on the said Grand Rapids and Indiana Railroad Company. And, if so, what?

A. Brakeman; I suppose so; at least they all said so that was there.

Q. You may state what you may know, if anything, of the breakage or giving away of any car or part of car on the freight train on the Grand Rapids and Indiana railroad which was standing at the depot of said road at the time the plaintiff was injured and carried into the depot of said company.

115 A. I saw the wheel as broken into; I saw about one-third of the wheel with one spoke in it. It was the brake-wheel that was off of that train, and I saw a vacant place on the train, where they all said it came from; there was a rusty place in it, which I would call a flaw, in the rim, about two-thirds of the way through.

Q. Please explain what you mean by the words wheel and rim, as used in your answer to the last interrogatory before this.

A. I mean the rim on the wheel that was used on the end of the brake. It was an end brake.

Q. State at what part of the car the vacant space or place was where you noticed the absence of the brake head or wheel.

A. The vacant place was at the end of the car.

Q. State who, if any one, was present with you when you examined this wheel and what light, if any, you had with which to make the examination of the said wheel or rim.

A. There were several present. Mr. Joshua Rinehart was one, Mr. P. S. O'Rourke. I knew of a good many that were there looking at the wheel; they were all talking about the wheel and the flaw in it; there was a lantern there and a light at the corner that gave light.

Q. State whether or not you made an examination of this brake here or wheel with reference with determining its connection

116 as to its being sound or unsound before the accident occurred.

A. I examined it and pronounced it unsound.

Q. State what indications, if any, you discovered of the unsoundness or broken condition of the wheel or brake prior to the time of the accident.

A. There was a flaw in the wheel.

Q. What indications were there, if any, of a crack or break in the rim or wheel of the brake which indicated that it had been cracked or broken some time before?

A. It was rusted in.

Q. State how far this brake or crack which you say was rusted into extended into the wheel or rim of the wheel of the brake.

A. About two-thirds through.

Q. You may state if Mr. Lisles stayed at your house for any time after he received this injury. And, if so, how long?

A. Yes, sir; he stayed with me till he was able to be taken home; the number of weeks I do not recollect.

Cross-examination:

Q. At what place did you see the piece of the broken wheel spoken of?

A. Near the depot, close to the road crossing.

Q. How far away was the car from which you were examining the portion of the wheel was — taken?

A. It did not exceed fifty feet.

117 Q. Were you at the depot near there before the accident occurred?

A. I was not at the depot; I was at home; but at the time I heard them *hollowing* and saw them I did not know but what there was a fire till I got down there or near there.

Q. Who brought the broken wheel from the car to where you examined it?

A. I do not know.

Q. Did you not examine it before it was broken?

A. No; I did not see it.

Q. The flaw you speak of was simply a crack at one end of the broken part?

A. I suppose it was a crack.

Q. What is your business, Mr. Witness?

A. At that time I was selling agricultural implements.

Redirect:

Q. State on which side of the railroad you were when you examined the broken wheel?

A. I was on the east side.

Q. State whereabouts the break in this wheel or the rim of the brake occurred with reference to the crack and injection place at which you have spoken.

A. Separated right in the crack.

DAVID L. MASON.

R. B. WILLIAMS, of lawful age, being first duly sworn to testify the truth, the whole truth, and nothing but the truth in rela-

118 tion to said cause, deposeth as follows, to wit:

Q. State your name, age, and place of residence.

A. Robert B. Williams; age, fifty-five; reside in Noble county and State of Indiana.

Q. What is your business or profession?

A. I am a practicing physician and surgeon.

Q. How long have you been in the practice of physician and surgery?

A. About thirty years.

Q. Are you acquainted with the plaintiff, Osman Lisles?

A. I am.

Q. Did you see said Osman Lisles on or about June 27th, 1881? And, if so, state what time in the day or night, where it was, and his physical condition.

A. I was called to see him at the Grand Rapids depot. I think it was between ten and eleven at night. I would call his physical condition a compound commuted fracture of foot and ankle. At that time he was not out from under the influence of the shock, and was a talking incoherently a part of the time.

Q. If anything was done by way of amputating the foot or leg of said Lisles then or soon after, state it, and who was present and who performed the operation.

A. There was some delay. I was called to operate and I had not the instrument. In consequence of my not having the in-
119 strument I referred it to the railroad surgeon, Dr. Gilbert, of Kendallville. Dr. Gilbert visited the patient in company with Dr. Teal, of Kendallville. Dr. Teal operated and was assisted by myself, Dr. Green, my son Robert, and Dr. Gilbert. The left leg was amputated on the lower third.

Q. State when this amputation was performed by the surgeon.

A. Between one and two o'clock on the morning of the 28th day of June, 1881.

Q. State whether or not, in your judgment as a physician and surgeon, the condition of the plaintiff's foot and leg after the injury was such as to require the amputation of the foot as described.

A. Yes, sir; I considered it indispenable; the heel or oscaltus was mashed and ground fine, and that extended to the tibia.

Q. State what other injuries, if any, the plaintiff was suffering from at the time you saw him first—when hurt and afterwards.

A. Well, when I first saw him my attention was first called particularly to his leg; didn't discover any other injury at that time but after the limb was amputated he complained of his back. He complained of his back pretty much all the time he was left in my care till he went away. He was in my care all the time till he went away—between two and three weeks.

120 Q. What difficulty, if any, did plaintiff experience in passing urine after the injury, and how long did it continue?

A. I can't state how long the difficulty continued; it was strangury, and it was necessary to use the cathetar for a number of days.

Q. What did this strangury and the necessity of using the cathetar indicate?

A. Well, the pathology that I had of the case it originated from the injury of the *of the* back and spine.

Q. State what services you rendered the plaintiff *were worth* as physician and surgeon during the time you treated him were worth.

A. Forty dollars.

Cross-examination:

Q. Have you been paid anything by the plaintiff for said services?

A. I have.

Q. State the amount, Doctor.

A. I was paid twelve dollars.
Q. Was that all you charged?
A. I did not make that as a bill; I gave him the rest of the bill, as he was poor.

ROBERT B. WILLIAMS.

W. T. GREEN, of lawful age, being first duly sworn by me to testify the truth, the whole truth, and nothing but the truth in relation to said cause, testified and deposed as follows, to wit:

121 Q. State your name, age, and place of residence.
A. William T. Green; age, twenty-five years; I reside in Rome City, Noble county, Indiana.
Q. What is your occupation or profession?
A. I am a physician and surgeon.
Q. How long have you been in the practice of medicine and surgery?
A. Two years and a half.
Q. Were you, on or about the 27th day of June, 1881, called on to see the plaintiff as such physician and surgeon, and what was his physical condition, and what was then and there done?
A. I was present, and Mr. Lisles asked me to assist and do anything I could. We gave him such remedies to relieve pain as was necessary; in conjunction with Doctor Williams bound up the injured limb to stop hemorrhage until amputation could be performed, which was deemed necessary from the extent of the injury. It occurred about eleven o'clock p. m.; amputation was performed about four o'clock the following morning by Dr. Gilbert and Teal, Williams and myself assisting.
Q. State how long you attended him during the time he was suffering from this injury.
A. I attended him altogether about twenty-two or three days.
Q. How much were your services as such physician and surgeon worth for the services rendered plaintiff during the time he suffered from the result of said injury, and what did you
122 charge him for the same?
A. If I had charged him the regular rates, at a dollar a visit, it would have been between forty and fifty dollars, but I charged him twenty-five ($25) dollars for services and medicine and received the same.

WM. T. GREEN, M. D.

JOSHUA S. RINEHART, of lawful age, being first duly sworn by me to testify the truth, the whole truth, and nothing but the truth in relation to said cause, deposed as follows, to wit:

Q. State your name, age, and place of residence.
A. Joshua S. Rinehart; age, thirty-one years.
Q. What is your occupation or profession?
A. Selling dry goods and groceries.
Q. Are you acquainted with the plaintiff; and, if so, how long?
A. I am; I have known him ever since he was hurt.

Q. If you know of his being hurt at any time on the Grand Rapids and Indiana Railroad Company's road state when and where it was.

A. The first I knew of his being hurt Mr. Rably came to me and told me that there was a man by the cars and I went down to the depot. There is where I saw the man, and see the condition of his limb. I saw where something had run over his heel, the train, as stated, cutting the heel and smashing it. I do not recollect the time.

123 Q. State whether or not there were standing at or near the depot on the Grand Rapids and Indiana railroad, at the time you saw the plaintiff there injured, any cars; if so, what kind and how many?

A. There were freight cars standing on the track and an engine attached to said cars.

Q. State whether or not while at the train at that time you saw any part or parts of a broken rim or brake-wheel; and, if you saw any, so state.

A. I did.

Q. What examination, if any, did you make of the part or parts of the broken wheel or rim, and what was the condition of the same, with reference to its soundness or unsoundness?

A. I was out there and Mr. O'Rourke, superintendant of said road, and I examined the wheel at the same time; he had a lantern; we looked at the wheel and I spoke and said there was a flaw in the wheel. He picked it up and looked at it and he said, "I don't see any flaw in it." I showed him and said to him what I thought was a flaw by the looks of it; the flaw seemed to strike in quite a ways.

Q. State whether the br-ake in this wheel occurred with reference to the flaw you have spoken of.

A. It broke through the flaw.

Q. State what examination you made, if any, of this brake or this wheel of the brake to determine its condition, as to its being

124 cracked or otherwise?

A. I examined with reference to that, and I found what some would call a crack, but I call it a flaw.

Q. State whether this flaw or crack was on its outside or inside of the rim of the brake-wheel.

A. My recollection of it is it was from the inside out.

Q. State how far this flaw or break extended into the rim of the brake-wheel.

A. I think the point of the flaw run about half way through rim.

Q. State what, if anything, there was to indicate how far the break or flaw extended into the rim of the brake-wheel.

A. What I claimed, the flaw was an old crack with a dead look, while the balance of the brake was new and bright.

Q. State what you know, if anything, as to where this broken brake-wheel had been just before you examined it?

A. It was picked up right there by the end of the car. I knew by the appearance that it was broken off of the end of a freight car; it was broken off from a freight car in the train standing there on the track.

Q. State on which side of the railroad track you found this wheel and made this examination.

A. On the east side of the track, about twenty-five feet from the depot?

125 Q. State how many pieces of this broken brake-wheel you saw and examined.

A. I saw two pieces of the wheel.

Cross-examination:

Q. Is it not a fact that the flaw you spoke of was indicated solely by what seemed to be an old crack or break partially through the rim, or do you mean to say the iron of which the wheel was made was defective?

A. My candid opinion is that the crack was always there; the iron never cemented or formed a solid part.

Q. On what do you base your opinion?

A. I base my opinion on the fact that where the brake was it was smoother than the newly broken part.

Q. Of what kind of iron was the wheel made — cast or wrought?

A. In my opinion it was cast.

Q. Have you ever had any experience or do you know anything about the business of moulding, or was you ever engaged in any way in the manufacture of castings?

A. I have not.

JOSHUA S. RINHART.

GEORGE W. MOORE, of lawful age, being first duly sworn by me to testify the truth, the whole truth, and nothing but the truth in relation to said cause, deposed and testified as follows, to wit:

126 Q. State your name, age, and place of residence.

A. George W. Moore; age, twenty-seven (27) years; I reside in Rome City, Noble county, Indiana.

Q. What is your occupation or profession?

A. I am a cooper by trade.

Q. Are you acquainted with the plaintiff, Osman Lisles?

A. I am.

Q. Do you recollect of a circumstance of the plaintiff being injured near this place?

A. Yes, sir; I do.

Q. You may state whether or not, after this injury to the plaintiff, you examined the pieces of broken brake-wheel; and, if so, when and where it was.

A. I did; it was north of the Grand Rapids depot here, when I see — it was in the morning, about six o'clock, after the accident happened; it was right north of the depot, between the telegraph pole, and the track on the ground.

A. State how many pieces of the rim you saw.

A. I saw two or three.

Q. You may state whether or not you made an examination of

this broken brake-wheel, to determine whether or not the same had been whole and perfect, before the happening of the accident.

A. I did.

Q. What indication, if any, did you observe of its dangerous condition previous to its breakage the night before?

127 —. I noticed a flaw in the rim of the wheel two-thirds of the way through the wheel.

Q. What did you observe in the appearance of this broken rim or wheel that indicated the flaw you have spoken of?

A. You could tell by the old br-ake; it was rusted two-thirds through the wheel, while the rest was bright.

Q. You may state whether this old br-ake or flaw was from the inside of the rim of the wheel out *as* from the outside in.

A. From the inside out.

Q. You may state what the fact is as to whether or not the pieces of the broken rim and brake-wheel of which you have spoken were at and on the ground where you found them the evening before you found them in the morning.

A. They were not there.

Cross-examination:

Q. Was there more than one of what you call flaws in the wheel?

A. I disremember, but I had an idea that there was two, but the one I distinctly remember that was about two-thirds through; I don't remember any others.

Q. You spoke of rust in the old br-ake or flaw, as you call it. State, if you can, how much it was rusted; whether or not

128 it was enough to discolor it or whether it was eaten away by the rust or not.

A. It was discolored, but not eaten away.

Redirect examination:

Q. State what became, if you know, of the broken pieces from off of the brake-wheel.

A. I could not say what became of them.

Q. State who, if any one, had possession of these pieces of this broken wheel after you examined them.

A. I saw Pat. O'Rourke have them.

GEO. M. MOORE.

STATE OF INDIANA, *Noble County:*

I, William L. Hosier, justice of the peace in and for said county, do hereby certify that David L. Mason, R. B. Williams, Wm. T. Greene, Joshua S. Rinehart, and George Moore, the above-named deponents, were by me each severally first sworn to testify the truth, the whole truth, and nothing but the truth relating to the cause now pending in the Randolph circuit court, Randolph county, Indiana, wherein Osman Lisles is plaintiff in error and The Grand Rapids railroad is defendant; that the foregoing depositions were each and all reduced to writing by Chichester Holden, a disinter-

ested person, in my presence and under my direction; that
129 said deponents severally subscribed his deposition after the same had been carefully read over to each of them; that the said defendant was present at the taking of said depositions by Allen Zollars, her attorney; that each and all of said depositions were taken at the town of Rome City, county of Noble and State of Indiana, on the 22d day of August, 1882, between the hours of 10 o'clock a. m. and five o'clock p. m. of said day, agreeably in all respects to the annexed notice, except the change from the post office to my office.

In witness whereof I hereunto subscribe my name and affix my seal this 22d day of August, 1882.

[SEAL.] WILLIAM L. HOSIER,
Justice of the Peace.

Counsel for plaintiff offered in evidence and read to the jury the deposition of Frank Wrestler, taken on behalf of the plaintiff in this cause on the 9th day of April, 1883, which deposition is in the words and figures following, to wit:

Depositions of witnesses taken to be used in an action pending in the United States circuit court for the district of Indiana, wherein Osman Lisles is plaintiff and The Grand Rapids and Indiana Railway Company is defendant, for said plaintiff, in pur-
130 suance of the notice hereto annexed, and at the time and place therein specified, Robert P. Kennedy being present on behalf of said plaintiff and W. S. O'Rourke on behalf of said defendant.

FRANK WESTLER, of the county of Allen and the State of Indiana, of lawful age, being first duly sworn to tell the truth, the whole truth, and nothing but the truth by me, as hereinafter certified, deposes as follows:

By KENNEDY:

Q. State your name, age, residence, and business or occupation.

A. Frank Westler; age, twenty-nine; live at Fort Wayne; laborer.

Q. State in what business you were engaged on the 27th day of June, 1881.

A. I was brakeing on the Grand Rapids and Indiana railway train.

Q. Who were the employees of said company running and managing said train?

A. Dan. Hays was conductor; Osman Lisles and myself were brakemen, and the engineer I don't know who *it* was; think the fireman was Al. Christy.

Q. State from what point said train started and to what point it run on said 27th day of June, 1881?

A. Started from the new yard here in Fort Wayne and run to Grand Rapids, terminal point.

Q. State what kind of a train it was and how many cars
131 were in the train, as near as you can.

A. It was called a through freight train. I don't know the exact number of cars, but I think between fifteen and eighteen cars.

Q. State what time that train left the yard at Fort Wayne.

A. Left about seven o'clock.

Q. Under whose direction and control was the said train?

A. It was under the direction and control of Dan. Hayes, conductor.

Q. State in what capacity Osman Lisles was engaged on said train and how long he had been so employed.

A. He was brakeman. I could not tell how long. I know he had been about a month before I went on; that would be about two months.

Q. How long were you and he both brakeing on said train together?

A. About a month.

Q. What kind-of a brakeman was Osman Lisles, as to being skilled or otherwise in said railroad?

Objected to by O'Rourke.

A. I say he was a good brakeman.

Q. State what happened to Osman Lisles, if anything, on the night of June 27th, 1881; state fully.

A. We were stopping at Rome City for water. He was set-
132 ting up brakes at the hind part of the train, and one of his brakes was an end brake, and in setting up that brake it broke with him, throwed him down, and crushed his foot by the train.

Q. State what part of the train this car with the end brake which he was setting at the time was and how near the engine or tender.

A. It was at the hind part of the train, about fourteen cars from the engine and about the second or third car from the caboose.

Q. Explain what you mean by setting an end brake and how the brake is affixed to the car and how the person setting operates it.

A. An end brake is fixed at the end of a car, so a person in setting the brake has got to stand in between the cars and pull down on the wheel with his hands, and is fastened into the end of the car by a shaft put into the car and a half circle of cast iron with a hole in the middle of the casting, and this shaft is run through that iron t-rough the hole into the car, and the brake-wheel is on the out end of this shaft, and a chain is fastened on the shaft, and as you pull the wheel that winds up the chain and tightens the brakes.

Q. State upon what the person operating an end brake stands at the time he is setting it and how he reaches that point.

A. Stands on the deadwoods—strands straight up, and, with his hands on the wheel, hangs with his weight down.

133 —. State what you mean by saying he was thrown down under the car.

A. When the brake broke he had nothing to hold to, and in set-

ting the brake his weight was so heavy that he fell, and in falling there was not room enough for him to fall outside, and it knocked him down between the cars.

Q. In what county and State was this—did this happen?

A. In the State of Indiana, Noble county.

Q. State upon what part of the train you were at the time.

A. I was on the front part of the train; I was about third car from the engine.

Q. What signal, if any, was given calling for brakes, and by whom?

A. Was a signal, a short whistle for brakes, given by the engineer—one short whistle.

Q. In what manner was your attention called to Lisles, if at all, and what did you find?

A. My attention was first called by his lantern standing on end of the car and by his calling for the conductor to come and get him, and the conductor called me to come and help get Lisles, that he had got hurt. I went and found that he had his foot badly crushed.

Q. State what examination you made, if any, of his foot and in what condition you found him.

134 A. I made an examination of his foot when I got there, and found that it was all crushed and his ankle broken, and he was lying right at the edge of the water of the reservoir.

Q. State what examination, if any, you made of the brake and in what condition you found it.

A. I examined the brake and found that there was a flaw in the casting, and in the way it was put into the car.

Q. State what flaw, if any, you discovered in the casting, and where, and the nature of it.

A. It was—the shaft was cracked; what I mean by the shaft was the iron that went through into the car. This shaft on the inside of the car should have had a key to go through it or a bur on the end; instead of that I could find neither, no place for a bur and I could find no key.

Q. State whether or not the shaft had a thread cut upon it for a nut.

A. No, sir; it did not.

Q. What examination, if any, did you make of the end of the car through which the shaft was driven; and, if any examination was made, in what condition did you find that?

A. I examined it the best I could. I didn't get into the car; it looked as though the shaft wasn't long enough to be fastened secure as it ought to be.

135 —. Through what was the shaft driven or put into the end of the car, and in what condition was the wood-work?

A. It was put through the siding, an inch-and-a-half or two-inch studding, and the siding was broken outside; the studding—I couldn't see plain enough to see how the studding was on the inside of the car; from what I could see it looked more like a board than it did like a studding. I don't think it was split on the inside.

Q. What examination, if any, did you make of the brake, and in what condition did you find that? State that fully.

A. I found the brake, the castings, all broke into pieces—into four or five pieces.

Q. State, if you know, what car this was, and the number of it.

A. Union Line car, number thirteen ninety-seven (1397).

Q. When was this car taken into the train and where was it put out on that night or day?

A. It was taken in at the yard in Fort Wayne, and I think it was set off at Kalamazoo.

Q. State what stick or instrument, if any, Lisles was using that night, if you know.

A. He didn't use any.

Q. State upon what occasion, if any, Lisles ever used any stick or instrument of any kind other than his hands while brake-
136 ing during the time you were with him on said train.

A. I never see him use any stick of any kind at all—no instrument but his hands.

Q. What, if anything, was done for Lisles that night?

A. I got a cushion out of the caboose and took it where he was hurt, and put him on that cushion and carried him to the depot. We then sent for Dr. Green; he came and would not do anything until Mr. O'Rourke came; he did give him some whiskey before Mr. O'Rourke came. Mr. O'Rourke was called; he was at the hotel there; he came, and Dr. Wilson was set for at Walcottville, and the conductor and engineer took the engine and went after him. The doctor had his buggy there and came over in his buggy; during this time Dr. Gilbert, from Kendallville, was sent for. We started on north then with the train.

Q. Where do you expent to be at — time of the next term of the United States circuit court at Indianapolis?

A. I expect to be out West, in Montana or Dakota. I expect to stay there.

Cross-examination by Mr. O'ROURKE:

Q. When did you quit the employ of the Grand Rapids Company?

A. I think it was in August, 1881.

137 Q. You may state what you quit the employ of the Grand Rapids for.

A. I was discharged off of the road.

Q. Who discharged you?

A. Mr. Hunter.

Q. How long had you known Osman Lisles at the time of the injury?

A. About two months.

Q. You may state how long, if you know, he broke on that road before you went to work for them.

A. I don't know how long; I know he had broke about a month.

Q. You may state on what grounds you base your opinion as to Osman Lisles being a skilled brakeman.

A. In attending to his business and doing his work quick and doing it right.

Q. You say that he used good judgment in setting up his brakes; how do you know that to be a fact?

A. By brakeing with him and seeing how he handles a train.

Q. How do you know that he was setting up brakes other than the end brake that is alleged to have broke when there was eight to twelve cars between you and him?

A. Because there was some poor brakes between him and me, and rather than go so far he had rather set the end brake and save time by doing so.

Q. You may state whether or not you examined all the brakes on that train that night.

138 A. No, sir; I did not.

Q. How do you know, then, there were poor brakes on Lisles' part of the train?

A. Because I always examine enough brakes to hold the train. I thought he had some poor brakes.

Q. Are you in the habit of examining the brakes on the train other than the ones on that end or part of which you have supervision?

A. Yes, sir; it is my business to examine all the brakes on both ends of the train, enough to hold the train; the rules require the brakeman to do that before the train leaves the yard.

Q. What do you mean by the half circle of cast iron with a hole in the center of it that the brake-shaft passes through?

A. It is a brace to support the brake.

Q. In what condition was this casting?

A. This brace was all right; it was good.

Q. Does not the person setting an end brake stand on a platform and not on the deadwoods?

A. Some of them do and some of them don't.

Q. On which did Lisles stand—platform or deadwoods?

A. He stood on the platform, but I call it deadwoods; I call it all the same thing.

Q. Is it not a fact that every freight car has deadwoods and only those that have an end brake have both deadwoods and platform?

A. Yes, sir.

139 Q. Could Osman Lisles have stood on the deadwoods and set an end brake.

A. Not unless the rest of the platform, the whole of it, had been there.

Q. Was the platform broken?

A. No, sir.

Q. What do you mean, then, by saying not unless the rest of the platform had been there?

A. If there had not been any platform there he couldn't have set the end brake.

Q. The fact is, then, that he did not stand on the deadwood-?

A. Well, I claim the whole thing is deadwood-.

Q. What are the deadwoods?

A. The deadwoods are irons—big irons put on there; two big irons on each side are fastened on to this platform.

Q. Whereabouts on the platform?

A. Well, I should judge about a foot from the outside of the car.

Q. What is the deadwood- for?

A. Some cars have them instead of bumpers.

Q. Is it not a fact that this platform is put there for the purpose of the brakeman to stand while setting the brake?

A. It is put there for that purpose, for one thing and another thing; they have got to have them projections out there to hold the big irons.

Q. How do you know that Lisles hung on to the brake-wheel with his whole weight?

140 A. Why, a man putting his weight on to the wheel he can set it tighter.

Q. Is it not a fact that there is more danger to the person setting an end brake to throw the weight of their body on the brake than to stand upright and simply use the strength in their arms?

A. Yes; but you might as well not set a brake at all then.

Q. You may state whether or not his boot or shoe was torn off of the foot you say was crushed.

A. Yes, sir; it was.

Q. Whereabouts was this place in the casting?

A. In the shaft.

Q. On that part on the inside or the outside of the car?

A. On the outside.

Q. How was it, then, that you did not observe this flaw when you examine- the brakes?

A. Because I did not get down in between the car- to examine it, and supposed the other brakes on top the car were good until I got to them.

Q. Then you did not examine this end brake thoroughly, did you?

A. Did not examine it until after he was hurt.

Q. Then you did not observe your custom closely on that day in the examination of the brakes?

A. I knew he had two or three good brakes behind, and I had two or three ahead, and I knew that was enough to hold the

141 train. I examined until I had enough to hold the train.

Q. Did you not state that this end brake was the first good brake on his end of the train?

A. No, sir; I did not.

Q. How much of the broken shaft remained in the end of the car?

A. I didn't remember whether any of it remained in. I couldn't tell as to that.

Q. How much of the shaft was broken off?

A. I don't remember how much was. I think about six inches.

Q. How do you know, then, that there was no bur or key on the end of the shaft on the inside?

A. I judged from the looks of the shaft.

Q. How much of the siding was broken on this car?

A. Why, there wasn't very much broken; just where the shaft went into the car.

Q. If you did not enter the car how do you know there was only a board and not a studding on the inside?

A. I said it looked more, from what I could see, like a board.

Q. How much of this piece of timber that you say looked like a board could you see?

A. I couldn't see very much—perhaps half—three-quarters of an inch of it.

Q. How do you know, then, that it was not the usual studding that is put in such cars?

A. As I said before, it might have been studding, but it didn't look like it.

142 Q. Where did you find those four or five pieces of the brake?

A. Between Lisles and the depot.

Q. When did you find them?

A. When I went up to flag the other section; probably twenty minutes; I don't know just how long I was gone.

Q. Did you first help carry Lisles to the depot?

A. Yes, sir; I did.

Q. Then when did you examine these four or five pieces of the brake?

A. When I came back from flag-ing the other section.

Q. Did you pick them up on your way back from flagging the other section?

A. Yes, sir; I did.

Q. What caused you to pick them up?

A. I don't know as anything particularly, only I wanted to see how they was broken.

Q. You have interested yourself considerably in this case, have you not, Mr. Westlor, in the way of hunting up evidence for Osman Lisles?

A. No, sir; I have not; I haven't put myself out of the way at all.

Q. How do you remember the car was a "Union Line" car and numbered 1397.

A. Dan. Hays asked me what the number was and I looked.

Q. And you have remembered it ever since?

A. Yes, sir; I have.

143 Q. How do you know that Lisles did not use a stick or other instrument in brakeing?

A. He never did, since I knew him, use a stick; I didn't see him have any that night.

Q. Might he not have used one and you not know it?

A. He couldn't very well use it on an end brake.

Q. Might he not have used one and you not know it?

A. Yes, sir; he might.

Q. Don't you know that it is an impossibility for a man to break a brake-shaft, using nothing but his hands in setting it?

A. Some ways it is and some ways it ain't.

Q. By setting it the right way?

A. It is, if everything is secure as it ought to be.

Q. When do you expect to go to Montana or Dakota?

A. To-morrow.

Q. You may state what, if any, feeling you have in this case.

A. Well, I have no feeling particularly; have no feeling against the company.

Q. Have you any feeling towards any of the officers of the company?

A. No further feeling than this—that I don't think Mr. Hunter acted the gentleman; that is all I have against him one way or another.

Q. Then your feeling towards Mr. Hunter has caused you to take some interest concerning the securing of evidence for the plaintiff?

144 A. No more than this, Mr. Lisles wanted my deposition, and I told him if I went away I would let him know.

Q. Then you informed Mr. Lisles, did you, that you had some good evidence and that he should secure it?

A. No, sir; I did not.

Q. What did you tell him?

A. I told him that I was going away and if he wanted my deposition he should come and take it.

Redirect by Mr. KENNEDY:

Q. After picking up the pieces of broken brake were they shown to or examined by anybody; and, if so, whom?

A. Yes, sir; by Charles Pierce, a brakeman on train behind us, and, I think, Mr. Wright, of the train behind. Several more examined, but I don't just remember who they were.

Q. State, after your examination of the shaft, whether it was broken off in the car or pulled out altogether.

A. It was out of the car altogether.

Q. State whether or not it is possible to break an end brake by turning the wheels from the platform below with the hands if everything is in good condition.

A. No, sir; it is not.

Q. State what explanation, if any, was given you as a cause for your discharge from the employment of the company.

145 A. I did not get any reason why; I asked them, but they gave no reason.

Q. What, if anything, was said about your being a good brakeman and having given good satisfaction by Mr. Hunter, who discharged you?

A. I asked him if I hadn't always attended to my business, and if it was anything I had done on the road, and he said: "No, sir; I haven't a word of fault to find with your work."

FRANK WESTLER.

THE STATE OF INDIANA, *County of Allen:*

I, Newton Wyeth, a notary public in and for the county and State aforesaid, duly commissioned and qualified to administer oaths and

take depositions do hereby certify that the aboved-named Frank Westler was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing deposition was by him in my presence subscribed after the same was carefully read over to him by me; that the foregoing deposition was all written by me, not of kin to either of said parties nor attorney in said case, and were taken at the time and place specified in the enclosed notice, and that I am not a relative or attorney of either of said parties nor otherwise interested in the event of said action and proceeding.

146 In testimony whereof I have hereunto set my hand and official seal this 9th day of April, 1883.

NEWTON WYETH,
Notary Public.

Counsel for plaintiff offered in evidence and read to the jury the deposition of M. D. Wilson, taken on behalf of the plaintiff in this cause on the 19th day of October, 1883, which deposition is in the words and figures following, to wit:

Deposition of a witness taken before me, David L. Pettey, a notary public within and for the county of Logan and in the State of Ohio, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the plaintiff in an action pending in U. S. circuit court for the district of Indiana, at Indianapolis, in which Osman Lisles is plaintiff and Grand Rapids and Indiana Railroad Company is defendant, James W. Steen being present on behalf of plaintiff and A. A. Chapin on behalf of defendant.

M. D. WILSON, of lawful age, being sworn according to law by me, deposes and saith as follows:

Questions by PLAINTIFF:

Q. State your name, age, residence, and profession.

A. M. D. Wilson; residence, Belle Center, Logan county, Ohio; age, sixty-three years; practicing physician.

147 Q. State if you are acquainted with the parties to this suit; if so, how long have you known them or any of them?

A. I am acquainted with Mr. Lisles only—of the parties I mean; have been acquainted with him since his birth.

Q. State what services you have rendered for the plaintiff since June, 1881, if any, and what was the cause or nature of his sickness, if any.

A. I attended him, I think, some time in March last. O, yes; I attended him some at the time he came home from Fort Wayne. I — by that I did not attend him exclusively. I attended him at the time of the dressing of his leg. It had not quite healed up yet from the amputation. I didn't see any bruises or *ubcation*, but there was a tenderness on pressure.

Q. Since 1881 what services have you rendered for said plaintiff, if any?

A. I attended him once since, when he had an attack of fever; last spring, I think, and the same difficulty in his side presented itself—pain in the side and a slight tenderness on pressure in the same locality described before.

Q. What, in your opinion, was and is the cause of said soreness and pain in the side?

A. From the history of the case and from the symptoms I believe it to have originated from some injury.

Q. Prior to June, 1881, were you his physician; if so, were
148 you ever called on to treat him for soreness or pain in the side?

A. Yes, sir; I was called his physician. I never treated him for any soreness or pain there before. I was called to dress the wound, and the pain was a circumstance existing at the time; whether they called me for that I don't know.

Q. Where and how long have you been engaged in the practice of medicine?

A. I have been practicing medicine thirty years. I practiced medicine in Belle Center, Ohio, twenty-eight years.

Q. If you can, give the exact date subsequent to June, 1881, that you were first called on to dress plaintiff's wound; if you cannot give it exactly, fix it as near as you can.

A. I can't tell; if I thought it had been necessary I could have looked up in my books, but it was immediately after his return from Fort Wayne.

Q. Was it in the month of June, July, or August that you first visited him?

A. Indeed I could not say. I haven't no way now of identifying the time.

Q. You say you found a tenderness in his side; state how you know there was such tenderness or soreness.

A. By pressing on the lower part of the ribs next to the backbone.

Q. Were there any wounds, marks, or abrasions or any other external indications of such tenderness or soreness?

149 A. Not that I observed.

Q. Then the only knowledge you had of such tenderness was from what the plaintiff communicated to you by his language or his manifestations of such by flinching or shrinking from your touch, was it not?

A. Yes, sir; I think I had no other communications of it that I remember of.

Q. Did you treat for this tenderness? If so, state what your treatment was.

A. Well, I gave him anodynes to allay the pains and fomentations to relieve the difficulty.

Q. Are you sure you applied any fomentations to his side?

A. I think so; that is my recollection now; I am not sure.

Q. How long did you continue this treatment?

A. I only treated him a short time. I can't say just how long; it must have been four or five days.

Q. Did your treatment seem to relieve him?

A. Yes, sir; it seemed to relieve him to some extent.

Q. Did you not administer the anodynes to relieve the pain resulting from the injury to the leg?

A. No, sir; he didn't complain of the pain in his leg.

Q. His leg was not sore at that time, then, was it?

A. Yes, sir; it was sore; it had not healed up at that time.

150 Q. You say that, in your opinion, the tenderness in the side resulted from some injury. State particularly why you think so.

A. From the history of the case and symptoms present.

Q. This history was from what you learned from inquiry, was it not, and not from personal knowledge?

A. Yes, sir; from the statements made.

Q. Do you mean to say that pain in the side or soreness or tenderness results only from injury?

A. No, sir; it may arise from other causes.

Q. Then what is there peculiar in the symptoms that you here described that enables you to form an opinion that it resulted from an injury rather than from some other cause?

A. Well, I don't know; I suppose, from the history of the case, I was led to believe that was the cause and the symptoms present that I have stated.

Q. Then if you had not learned the history of the case the symptoms would not have enabled you to form such an opinion, would they?

A. I don't know that they would; I suppose not.

Q. You say you again attended him last spring when he had a fever; what kind of fever was it?

A. A bilious—an intermittent.

Q. What symptoms of any soreness or tenderness — his

151 side did you then discover and how did you discover them?

A. I discover- them by my attention being called to pain in his side; there had been a mustard-plaster there; there was a slight tenderness there.

Q. Doctor, do you pretend to say or give it as your opinion that the pain which you describe as being present last spring had any connection or resulted from the same cause as the pain did on the former occasion?

A. I don't know that.

M. D. WILSON.

THE STATE OF OHIO, *County of Logan:*

I, David L. Petty, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named M. D. Wilson was by me first sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by him submitted, as above set forth, were reduced to writing by me in the presence of the witness, and were subscribed by the said witness in my presence, and were taken at the time and place in the annexed notice specified, and were continued from day to day, as above set forth; that I am not counsel, attorney, or rela-

tive of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and
152 official seal this 19th day of October, 1883.

DAVID L. PETTEY,
Notary Public in and for Logan County, Ohio.

LORENZO L. WRIGHT, called for the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Gen. KENNEDY:

Q. State your name, age, and residence.

A. Lorenzo L. Wright; age, 33 years, past; my residence is Fort Wayne, Indiana.

Q. State what you business or occupation is.

A. I am baggage master on the Grand Rapids and Indiana railroad.

Q. What business were you engaged in on or about the 27th of June, 1881?

A. I was conductor on the freight train on the Grand Rapids and Indiana railroad.

Q. State whether or not you were acquainted with the plaintiff, Osman Lisle?

A. I was.

Q. What business was he engaged in on the 27th of June, 1881?

A. He was engaged as brakeman on the Grand Rapids and Indiana railroad.

Q. State whether you knew of Osmand Lisles receiving any injuries on or about the 27th of June, 1881; and if so, where he received them and what the injuries were.

A. I know of his receiving injuries upon the evening in question at Rome City, Indiana.

Q. What was the injury?

153 A. I could not say just what foot it was, but one of his feet was mashed by getting it under the wheels of the car.

Q. To what extent?

A. Well, I could not give nothing more than an opinion in that case. It was mashed; it seemed as though the body of the wheel had passed over the whole length of his foot, commencing at the heel or toe; I do not know which. It seemed as though it had passed over, crushing the ankle and foot.

Q. When did you first him after he had received the injury?

A. I saw him in the depot of the Grand Rapids and Indiana railroad, at Rome City.

Q. State to the jury how you came to be present and see the plaintiff after he received his injury.

A. I was running what is termed in railroad parlance the second section, No. 11, that evening. Mr. Hayes was conductor of the first section and I was conductor of the second section. When we got very near Rome City we were flagged to stop. I went ahead to see what was the trouble. I learned that there was one of the men on

the forward section injured, and I went down to see what was the trouble and saw Mr. Lisles in the waiting-room of the depot at Rome City, at the Grand Rapids and Indiana depot.

Q. Explain to the jury what you mean by the second section of a train.

154 A. The second section is a freight train that is running on the same schedule time as the section preceding it, having the same rights as the train ahead.

Q. Now, what do you know of your own personal knowledge as to how Osmand Lisle received his injuries that night?

A. I know nothing of my own personal knowledge.

Q. At the time you saw Osmand Lisle with his injured foot state who was present at that time and where he was; in what part of the depot.

A. It was in the waiting-room at the Grand Rapids and Indiana depot.

Q. Who was present there?

A. Mr. Owens, the agent; the superintendent of the road, and one or two visitors. I do not know as I can call the names.

Q. How about the employees of the road; who were there of them?

A. There was my brakeman, Mr. Pierce, who was braking ahead there. I do not recollect of seeing any of the others; at least I cannot call them to mind now.

Q. What inspection or observation did you make as to the train that was on the track or any of the cars? Go on and state what you know about it.

A. After I had seen Lisle in the depot the use of my lantern was requested to look at the car and the condition of the car upon

155 which it was said he had received his injury, and I went along. We looked at the different broken parts, and in this bracket here (indicating), somewhere along here—I could not recollect now just where it was—I discovered what I took to be an old flaw or an old break, what I would term or what has been represented to me as a sand flaw; it was not rusted, but had a bronzed appearance extending possibly two-thirds of the way across and possibly one-third of the depth; that was all that I discovered in the way of a breakage or of anything of that kind.

Q. What about the wheel; did you see that?

A. I saw the wheel—all the parts that were there.

Q. How many parts were there?

A. That I could not tell; I did not count them.

Q. About how many were there?

A. There were several; possibly two or three; there may have been four.

Q. What examination, if any, did you make as to the end of the car at which this accident occurred?

A. The examination was casual; it was up a little distance, and all the examination I would make would be simply to look up to see that part.

Q. Did you look up?

A. Yes, sir; I looked up.

Q. What did you see.

156 A. I saw this iron wheel attached here; the parts that were not broken off, the parts that remained after this part was broken off (indicating), and also the hole in the end of the car for this shaft to go in.

Q. Where were those parts of the iron that were broken off?

A. They were on the end of the car.

By the COURT:

Q. How many pieces were broken off?

A. I could not tell you whether one or two, but whatever was left here was on the end of the car; that is all I can recollect.

By Gen'l KENNEDY, resuming:

Q. I will ask you whether, upon examination, you did not find but one piece instead of two?

A. I could not say; there are some of these casting that have a web here (indicating), and these parts here (indicating) there is a web between; it may have been one of those, but I could not say.

Q. State in whose possession the wheel and shaft were at the time you examined them. Who took possession of them there?

A. That I could not tell, who took possession of them; they were lying there on the ground scattered around in a little circle.

Q. What time of night was it?

A. It was after ten o'clock somewhere; it may have been after 11 o'clock; I could not say; it was somewheres between 10 o'clock and 11 o'clock at night, but I could not be exact now.

157 Q. When the wheel separated from the car with the chain and this part attached to it what became of the wheel, it and the chain attached, together with the shaft?

A. It was still dragged along with the train, I suppose.

Q. Under the car?

A. It would fall down over the deadwoods and drag along.

Q. Explain to the jury what you mean by the deadwoods.

A. You have a model of the car, I believe; if that was brought here I could indicate what it is.

Q. State what examination, if any, you made as to the rim of the wheel, in regard to defects, if any.

A. I saw all the parts that were there. I did not discover any flaw in the rim of the wheel.

Q. Take that model and set it up on the table there so the jury can all see, and explain to the jury what you call the deadwoods.

A. I do not claim to be an expert in this matter or to know the names of all the parts of a car, but this platform is what I always term the deadwoods (indicating); these are the bumpers (indicating); they are made out of cast iron; they are sometimes called bumpers and sometimes deadwoods.

Q. Explain to the jury where a man must stand in order to apply that brake.

A. He would have to stand about here (indicating) to apply that brake.

158 Q. How does he make the application of the brake?

A. He makes the application with his hands in this position (illustrating), and turning in that way (illustrating). He would have to stand on this side in order to get any purchase of any consequence, because if he stood on the other side he would have to sl over that way with this arm.

Q. Explain to the jury what pulled out of this car and what was left as applied to the car.

A. This is the wheel and that is the casting (indicating). This part broke off here somewhere (indicating), and here is the chain passing along here (indicating), and this is the shaft (indicating). As soon as this broke (indicating), this part of the shaft-wheel and this part here (indicating), all would fall over this way and drag right over the deadwoods.

Q. Suppose there was on the inside of that shaft a pin or burr; what would become of the wheel in case this arm broke here (indicating)?

A. Well, the wheel would remain there, or else the shaft would break off inside and let it drop; there would not be but one or the other result.

Q. What examination did you ever make of the construction of this car to see how these shafts were fastened on the inside?

A. Since that time I have examined these cars, and I found that there were posts substantially put up on the inside and that this shaft extended through and is keyed on the inside.

159 Q. What examination, if any, did you make of this particular car to see what the defect was as to that part of it?

A. I made no examination only what I could see from the surface of the cars.

Q. In whose employ are you now?

A. I am in the employ of the Grand Rapids and Indiana Railroad Company.

Q. How long have you been in the employ of the company?

A. Five years last September.

Q. Since this accident were you at any time out of the employment of the company?

A. No, not directly.

Cross-examination by A. A. CHAPIN, Esq.:

Q. Was the chain, when you saw the brake-wheel, attached to the shaft of the brake-wheel?

A. It is my recollection it was.

Q. And it was also attached to the brake itself when you saw it?

A. It was, I believe; that is my recollection.

Q. And you say you did not get up and examine the place where the shaft of the brake-wheel was put into the car?

A. No; I did not.

Q. Well, did you examine that portion of the arm or bracket, as it is called there, that was up on the car to see whether there was any flaw there or not?

A. No; I did not.

160 Q. Who was present when you made this examination, such as you did make?

A. There were my brakeman, Mr. Pierce, the superintendent of the road, and there were several others, but those are the only two that I recollect of.

Q. Did anybody, while you were there, get up upon the platform at that time, or deadwoods, as it is called, to examine the portion of the brake on the car?

A. There did, I believe.

Q. Who was that?

A. The superintendent of the road.

Q. State whether he had a lantern or not.

A. He had. He had my lantern.

Q. Did he hold it up to close where it was broken?

A. It is my recollection that it is.

Q. What did he say about the break?

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial.

The COURT: Anything said on the subject is competent for either party, I think.

A. He said there was no break there, no flaw.

Q. Did he not, Mr. Wright, invite those standing around there to get up and look at it so as to determine the question whether there was any flaw or not?

A. I believe it was so understood if not expressed. I could not say that was the expression used, but it was so understood; it was free for all to examine.

Q. It was suggested that there was a flaw in that portion
161 of the brake, the part that was on the ground, was it not?

A. It was.

Q. And did not Mr. O'Rourke say that there was no flaw there, but that it was simply the sand and dirt that had got into the fracture as it was being dragged, and to determine it he got up on the car, looked at the portion up there, and then called the attention of the men there to it, and for them to get up and see for themselves and determine the fact; was not that done?

A. The suggestion was made that there was an old flaw in it, and he looked at it, and he says, "That is nothing but some sand and dirt, gentlemen," and then he got up and made this examination on the end of the car, and, as I say, I cannot recollect what the words *there*. I have no definite recollection of the words he used, but I say it was understood, and it has been my understanding, that it was free for all to look and see.

Q. If Mr. O'Rourke did invite any one to get up and look at it, did any one get up?

A. There was no one got up that I recollect of.

Q. You say that in your opinion there was an old sand flaw; might you not have been mistaken, and that the appearance was caused by just what was suggested by Mr. O'Rourke—that is, that it was the dirt and sand that had got into it in dragging it along?

A. My impression was that it was an old sand crack.

162 Q. You say it was not rusted?

A. No; it was not rusted; it had a bronzed appearance. Of course, there was sand there.

Q. There was dirt on the arm and some sand?

A. Yes, sir; there was some dirt and sand.

Q. Was that bracket or arm like this (referring to model), according to your recollection?

A. No, sir.

Q. If there was any difference, state wherein the difference was.

A. Well, it was not quite as broad, but more thick through this way (illustrating), and, as I recollect, there was a web or something there between that and this (indicating); this part was more thick, but not as broad as that (indicating). It was not exactly the same shape, but the pattern was about the same.

Q. The castings extended in, making a slot of the web?

A. Yes, sir.

Q. What is your impression as to where it was broke; was it broken up here (indicating), or was it broken down where it was all one piece?

A. That is a point I could not state—just where it was. It was broken near the shoulder, but whether it broke one piece or two pieces I could not recollect, because I did not make a close examination of it.

Q. Do you say that the rim of the wheel was broken?

A. It was broken, yes, sir; the wheel seemed to be in several pieces.

163 Q. Can you tell the jury to what extent it was broken; how many pieces were there?

A. I could not tell how many; there were three or four.

Q. Were there any indications of any flaws or cracks in the rim of the wheel where it was broken?

A. There were no indications of any flaws in the wheel.

Q. So far as you are able to judge from what you saw there, what would you say broke the wheel itself?

A. I would judge it was the fall upon the track or dragging of the wheel that broke the wheel. That was my impression at the time.

Q. The wheel was about this size, wasn't it (referring to wheel of the model)?

A. Yes, sir; it may have been a little bit smaller.

Q. You stated that the brakeman, in operating the brake, would stand upon this side and pull it over this way, so that the dog would catch as he pulled it around?

A. Yes, sir.

Q. I will ask you whereabouts on the car this dog was placed?

A. The dog was generally placed right underneath here (indicating), so that the end would balance a little bit, and it would always catch.

Q. Was it necessary in operating the brake in order to catch the dog for the brakeman to put his hand on the dog and push

164 it up, or would the weight of the dog itself keep the dog in its place?

A. It would where it was balanced right.

Q. The dog was hung in the middle so that one end was heavier than the other?

A. Yes, sir; hung in that shape (indicating).

Q. In operating the brake the brakeman could use both hands, could he? He was not obliged to put one hand on the dog to use it, was he?

A. Not necessarily, although where the dog is screwed too tight and does not work well he would turn the wheel as far as he could and attempt to hold it as well as he could and then put the other hand up and take hold of the dog and push it up.

Q. Was the portion of the hole in which the shaft had been put in broken out any?

A. The edges of the timber were torn and this side of the car was torn around the hole; that would necessarily be the case if the rod came out; that is all I could say in regard to it.

Q. I will ask you if there were any washers on the inside next to the timber, or was simply the dog caught right through against the wood?

A. My recollection is that there were washers only; that I have examined since.

Q. That washer was for the purpose of preventing the dog from wearing the timber?

A. Yes, sir.

165 Q. Do you say that the shaft running through there, through the wood, added to the strength of the brake in any particular manner, or was it for the purpose of keeping the shaft in its position and the weight of the chain or the power of the brake bore down all the hands on the outside wood or the inside?

A. It bore down upon both equally. I suppose it was intended to bear down upon both equally.

Q. Do you know what time this train started from Fort Wayne that night?

A. If my recollection is right it started about seven ten—ten minutes past seven in the evening. My recollection is that they left on time.

Q. Was it before dark?

A. Yes, sir.

Redirect examination by Gen. KENNEDY:

Q. Do you know who the inspector employed by the company in in the yards at Fort Wayne is—his name?

A. I do not know; I do not know the name of any of them. There are a number of them, but I do not know the names of any.

Q. How many inspectors are there in the employ of the company?

A. Possibly seven or eight.

Q. What are their duties?

166 A. There duty is to examine trains to see their condition—the cars, boxes, axles, wheels, crowbars, etc.

Q. Everything connected with the car?
A. Well, I could not tell to what extent. I know I have seen them examining the rolling part of the car.

Recross-examination by Mr. CHAPIN:

Q. You say there were inspectors there for the company; were they good, competent men for their business?

Counsel for plaintiff objected to the question as incompetent, irrelevant, and immaterial. The court overruled the objection.

A. They have been there for some time; that is all I know.
Q. I will ask you, so far as you know, whether they were men that were competent for their business, and careful men?
A. They were, so far as I know.
Q. Were the cars of the Grand Rapids and Indiana Railroad Company inspected by these men?
A. All cars that came into that yard were inspected by these men.
Q. I will ask you whether the Grand Rapids and Indiana Railroad Company use the same yard that the Pennsylvania Company does?

A. The Pittsburgh Company?

167 Q. Yes; the Pennsylvania Railroad Company; it is called the Pittsburgh, Fort Wayne and Chicago Railway Company.

A. Yes, sir.
Q. The same yards were used?
A. Yes, sir.
Q. And the inspectors were the inspectors that both roads used?
A. Yes, sir.
Q. Do you personally know whether this train of cars was inspected that night before it started out?
A. I do not, personally.
Q. That is, you did not see it inspected?
A. No, sir; I did not see it inspected.
Q. Was it not the habit and usage of the company to receive loaded cars from the Pittsburgh, Fort Wayne and Chicago Railway Company and forward them on its road to their destination?
A. Yes, sir.
Q. Do you know whether this car upon which the brake was, the giving way of which injured the plaintiff, was a car that had been taken from the Pittsburgh road or not?
A. I could not state whether it was or not—that is, to my personal knowledge, I did not see the bill.
Q. Was it not a Union Line car?

A. That is my recollection.

168 Q. Did the Grand Rapids and Indiana road own any Union Line cars?

A. They did not.
Q. Was not this car sealed?
A. It was.
Q. State what you mean by sealing, so that the jury will understand it.

A. A seal is of different forms, but upon this car, if my recollection serves me right, it has a wire that is passed through the lock or clasp after the car doors are fastened, and a metal bulb, I would call it, is fastened over this wire and pressed together with a stamp, forming a kind of a seal with the initials and dates on it, on each side of this seal. I do not know as it is necessary for me to give what a seal is in law, but that is the way they are in this case, if my memory serves me right.

Q. This seal was put on the lock of the door on the car, was it not?

A. Yes, sir.

Q. State to the jury, when that door was locked and the seal on, if there was any method of getting into that car without breaking the seal and unlocking the door.

A. There was none. There was no way of getting into the car without breaking the seal.

Q. Were these Union Line cars generally used upon the railroads centering at Fort Wayne?

A. Yes, sir; they were.

169 Q. Were they reputed to be safe and properly manufactured?

A. They were considered so.

And further the witness saith not.

The plaintiff rests.

Whereupon the defendant, to maintain the issues on its part, gave in evidence to the court and jury as follows—that is to say:

PATRICK S. O'ROURKE, called for the defendant, being first duly sworn, testifies as follows:

Direct examination by A. A. CHAPIN, Esq.:

Q. Where do you reside?

A. Fort Wayne, Indiana.

Q. What is your occupation?

A. Railroad man—superintendent of the Southern Division of the Grand Rapids & Indiana Railroad Company.

Q. How long have you been in the railroad business?

A. Since the 1st of January, 1855.

Q. What other roads were you employed upon, if any, previous to your connection with the Grand Rapids and Indiana road?

A. The Pittsburgh and Fort Wayne, the Michigan & Lake Shore, and roads through the northwestern portion of Michigan.

Q. How long have you been division superintendent of

170 the Grand Rapids and Indiana Railway Company?

A. Since the 1st of May, 1876.

Q. State whether or not you were at Rome City the night upon which the plaintiff was injured, as has been testified here before the jury.

A. I was.

Q. Where were you when you first received any information of his injury?

A. I was in bed at the hotel.

Q. State, without my asking questions in detail, what you did and what you saw there, giving a history of all the circumstances?

A. I had gone to bed a short time and I heard a freight train coming, or supposed it was a freight, as it was about the time they usually came, and the noise of the train sounded as though it had stopped, and immediately after the stoppage of the train I heard a noise as though some one was calling out in a loud voice. I did not mind it for two or three calls, but as it continued—I think four or five calls—it struck me some one might have been injured, and then I reflected a moment and I thought perhaps it was a lot of boys, as there had been some sort of exercises there that night. I thought it might arise from that; so I lay still a few minutes, and I remained in bed a short time; then I heard some one coming up into the hall and calling the porter, who slept in a room con-
171 venient to where I was, and I got out of bed and went to the door of my room and I inquired what the matter was, and whoever it was that called the porter said that one of the brakemen had got injured. I at once put on my clothes and went down to the station, and when I got to the station-room they already had the young man in the waiting-room, and there was quite a crowd of people gathered in around him, and I heard that he had one of his limbs crushed. I ordered a portion of the people out of the room for the purpose of giving him air, and I found that he had two physicians in charge of him—local physicians of the place. I asked them if there was any immediate necessity for doing anything with the limb, and they said not—not until reaction would take place. I then telegraphed for our physician at Kendallville to come up. I told the local physicians to keep him as comfortable as possible, but not to do anything with the limb unless actually necessary until the other surgeon came. I then ordered the engine that was on this train on which the young man was injured sent to Walcottville, about three miles from there, for a physician who was there that I had more personal knowledge of, he being regularly in the practice, and the engine went after that physician, and I think brought him back. After I had done that I then went out to look about the cars to see how the
172 accident occurred, and I found several parties—six or eight—standing on the ground near the end of the car, and they had the chain in their hand and the hoop of the wheel, and the chain was attached to this rod here (indicating), and the hoop, a portion of the spokes, and a small piece of the rim remained, and they had that in their hands and was examining one of these breaks; it was broke across here—this portion (indicating).

Q. State, in connection with this, whether the bracket was like the one that you have here.

A. Not exactly; that one had square corners and was similar to this, though not exactly like it. There was no web in here; it was broken off in that condition (indicating), leaving these two pieces that were bolted on the car still on the car, and the opposite pieces

that were broken off attached the shaft and hoop. When I got to the end of the car there was a lot of men standing there and they had this piece up there (indicating) in their hand and were examining one of these portions of the brace, and said there was a flaw in it. I walked up to whoever had it in his hands and took it out of his hand, and with the light that was there, holding it close to the lantern, I picked it with my finger-nail, and I remarked, There is no flaw here; this is where it has been dragged on the sand and
173 the sand has touched this portion of it; it is a little longer than the rest, and I picked the sand out with the end of my finger and it came out readily. I then said, "Gentlemen, we can very readily settle this question." The opposite portion of the break is on the end of the car, and I at once climbed on the platform, about four feet from the ground, and the bracket or brace attached to the car is about four feet up from the platform, perhaps a little more or less, leaving it about eight feet from the ground up to the bracket. I climbed up on the end of the car, and when I got on the platform I asked the gentleman who had the lamp in his hands to give it to me, and I stood up close to the bracket and examined both breaks, and I am positive there was not a particle of sand, crack, or rust there, and I turned around to the gentlemen there and I said "Gentlemen, this settles the question; this is a clean break; get up here and examine it for yourselves; you can see as well as I can." I called to them twice, I recollect distinctly, but no one got up, and I then handed the lamp down and climed down off of the car. After getting down I again picked up this broken part, and some of the men still remained there, and I showed it to the portion that remained there and said to them, "Any of you can see clearly for yourself, if you will get up and examine it, that it is just as I have
174 said," but no one did so.

Q. What do you say now as to whether or not there were any flaws there?

A. I say most distinctly that there was not any flaw, not even a crack the size of a hair, in any one of these braces.

Q. State whether there was anything in the external appearance of the iron of that bracket that would indicate any weakness about it or that it was unsafe.

A. Nothing that I could see; nothing in the bracket in any way, shape, or manner.

Q. Was this car one of the defendants company's cars, or what was it?

A. It was a Union Line car.

Q. What company owns those cars?

A. The Union Line Company; I believe they are owned by the Pennsylvania Company proper; they pass over that line, but as — the actual ownership, of course, I do not know.

Q. State whether or not that car was sealed that night.

A. I do not know positively, only from our records; as to going personally and examining it, I did not.

Q. You may state whether from an external inspection of that brake and its appliances, its attachment to the car, it could be de-

termined how the shaft of the brake was fastened on the inside of the car—from an inspection externally.

175 A. No, sir; no person from the external appearance would know whether the key was in there or not.

Q. State if, after the arm was broken, there would be sufficient strength in the wood to hold the wheel in its position so as to prevent its falling.

A. The tension that would break from any cause these brackets (indicating), if they were sound, would, if the shaft did not pull out, snap it off undoubtedly at once.

By Gen. KENNEDY:

Q. Please state that over again.

A. If these brackets broke (indicating), and that (indicating) broke down suddenly at once, the probabilities are that it would snap off the arm of the shaft here, or if it did not do that the power that would do that might probably pull off the key. That I do not know anything about, of course.

By Mr. CHAPIN, resuming:

Q. Is that arm made of wrought or cast iron?

A. It is a wrought-iron arm.

Q. State whether the end of the shaft there from the cog-wheel out—the rachet-wheel—is the usual length, or whether they are longer sometimes.

A. They vary; different roads have different wheels; some of them may be a little longer.

Q. How about the part that goes through the car?

176 A. That is about an average thing. There is only three inches of wood to go through. There is an inch siding and there is a 2 x 4 post put in on the inside of the car, which is usually used, so there would be only three inches of wood.

Q. Did you look into the hole from which that shaft came out?

A. I looked there, and my recollection is that the siding was up and down, and when the journal came out suddenly it had taken the edges off of the siding, stripping off a piece at the top end an eighth of an inch thick and growing thinner as it went down—that is, where the end of the axle would catch it—and ripped off a splinter. Beyond that there was no break.

Q. Where it came out it just took off a splinter?

A. Yes, sir; where it came out it ripped off a splinter off the weather-boarding and took it off.

By the COURT:

Q. Was that axle broken in this accident?

A. No, sir; the axle was not broken. The break that caused the accident was the break in the brace, and when the wheel broke down this portion of the wheel (indicating) struck against either the rail or the end of the ties, and the train still ran on some distance and bobbed it along and broke some portion of the rim, it being cast iron, and dragged that along.

By Mr. CHAPIN, resuming:

177 Q. Have you ever been a brakeman?

A. I have broke, but never was a brakeman. I have been a freight conductor, and in that capacity have had a great deal to do with brakes.

Q. On your road at the time this plaintiff was at work there what was the duty of the brakeman, as to seeing whether brakes were in order or not and reporting when they were not in order?

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial.

The COURT: The witness can state whether there was any certain rule or not.

A. Different roads have different rules. Do you want me to testify as to the duties of a brakeman?

Q. Yes.

The COURT:

Q. Have you any written or printed rules?

A. Yes, sir; and outside of them we have a traditionary rule, as to the duties of the men, that all railroad men are supposed to understand.

By the same:

Q. In other words, you mean that all of the rules are not in print?

A. No, sir; not all the details. There are only certain rules as to very important matters, but the general routine duties of the men they have to learn. One learns it from another, and they

178 become accustomed to it in the transaction of their business.

By Mr. CHAPIN:

Q. State what the duties of a brakeman were, as to examining brakes and reporting when they were out of order.

Counsel for plaintiff objected to the question as incompetent, irrelevant, and immaterial.

Q. Are your rules written or merely practice?

A. We have some written rules on the subject and some ar- not.

By the COURT: So far as they were written it can be proved and so far as it was practice you may state in regard to that.

The WITNESS: The duties of railroad train hands, conductor and brakeman—there is no difference as to their duties; it is a portion of their duties to pay attention to——

By the COURT:

Q. The question is whether there were written rules or not?

A. There was no written rule at that time. The duty of trainmen is to look after the condition of their train in all respects, and if they find anything wrong with the wheel, with the brake, with the frog, with the track, with the oil-box, or any part of the car which

can be brought plainly in view and which a man can plainly see, his duty is to either fix it or notify the conductor. Well, if it is a brakeman, to find it out and call some one's attention to the fact that a brake-joint is broken, that an oil-box is out of repair, or
179 there is a hot journal, or that the brake-wheel is out of order, or that there is anything the matter with the car.

By Mr. CHAPIN, resuming:

Q. When a brakeman operates one of these end brakes, where should he stand and how should it be operated?

A. He should stand on the platform. Those projecting platforms are for the brakeman to stand on when braking what we call the end brakes.

Q. It is suggested to me—I do not know how it is—in regard to that model that the end brake is on the wrong side of the car; that it is usually on the other side; how is that, if you know?

A. No; I do not know that it is.

Q. Where is the dog place?

A. The dog is sometimes above and sometimes below, and sometimes the ratchet is above and sometimes below the wheel. The ratchet is a piece of metal about that length—say six or eight inches long—and the end reaching over this wheel, for instance, is heavier than the opposite end, so it is supposed to set there. If it works readily it is always supposed to be set and holds its place there. If everything is working properly the ratchet would rest in the groove and would hold that groove in whatever position it was turned by the hands. Now, sometimes they work stiffly, and the brake-
180 man has to put his hand in to set the ratchet, or, if it is a top brake, he puts his foot against it, as he cannot do it with his hand.

Q. Did the defendant railroad company manufacture this car?

A. No, sir.

Q. Or any part of it. I include the car and brake appliances.

A. No, sir.

Q. State what the reputation of these Union Line cars were, as to construction and safety?

A. The Union Line cars are as good a class of cars as any in use, as a class.

Cross-examination by Gen. KENNEDY:

Q. Does your company build cars at all?

A. Yes, sir.

Q. And repair cars?

A. Yes, sir.

Q. Now, the cars that run over your railway are not all of its manufacture or cars that your company own?

A. No, sir.

Q. All kinds of cars belonging to different companies run over it?

A. Yes, sir; all the various connections and some away off.

Q. Your company uses and operates all classes of cars that come to it?

A. Yes, sir.

181 Q. Loaded and unloaded?

A. Yes, sir.

Q. You say you are the superintendent of this railway?

A. Yes, sir.

Q. That night there you were looking after the interests of the railroad company?

A. I was looking to see what caused the accident.

Q. Were you not looking after the interests of the railroad company?

A. I was looking after the interests of the young man who was injured first, and then I went out to see what caused the accident.

Q. What were you doing on the deadwood-?

A. I went to see what caused the accident.

Q. When you went out there and got up on the deadwood- or platform and called the people to get up there you were simply looking after the interest of the railroad company?

A. I was looking after the interest of truth, as an assertion had been made that there was a flaw there, and I climbed up and asked a gentleman there for a lamp and examined it up there. I was looking to ascertain the truth without any special view as to anybody's interest; being superintendent of the road, I naturally felt an interest, possibly in the interest of the company, and also an interest in the employee, who we looked on at the time as one of the family.

182 Q. At the time you got up there and spoke about these brakes you heard others about there remarking about them?

A. That there was a flaw?

Q. Yes.

A. Yes; and then, to satisfy myself, I climbed up and asked for a lantern and looked at it and saw that it was a clean break.

Q. But others examined it below and said there was a flaw at the same time?

A. Yes, sir; they said there was a flaw, and scattered off when I called attention to the other.

Q. You said that there was no flaw or crack the size of a hair.

A. I say there was no flaw.

Q. Have you got any inspectors for your cars?

A. Yes, sir; at different places.

Q. Where are they located?

A. Some at Richmond, Kalamazoo, and at various points.

Q. At Fort Wayne?

A. We pay the Pennsylvania Company for the inspection of our cars at Fort Wayne; we pay the company and they employ the inspectors.

Q. You say that night the pieces were all there of the wheel?

A. I did not say they were all there; I say there were portions of it there.

Q. You spoke about the wheel being broke as it fell upon the track?

A. I said in all probability when it fell over it either struck

183 the track or ties, and in dragging along this part was broke off.

Q. You do not know how it was broken?

A. No, sir; I suppose it was either from the falling on the rail or dragging against the end of the ties.

Q. After the pieces were gathered up there did you have possession of them?

A. I saw them.

Q. Did you not have possession of them and have them carried off?

A. I did not.

Q. You did not have possession of any of them?

A. No; not one single part. I do not know what became of the wheel or any piece of it.

Q. If you were looking after the interests of the railroad company and knew that piece was a sound piece, and that one of the others said — was cracked at that time, why did you not preserve it and have it here?

A. The reason is I did not think it necessary to preserve it. I examined it there on the car and asked others to come up and examine it and settle the question, but they did not do it, and I deemed it was not necessary, and that it was a clear established fact.

Q. After you had heard others assert that there was a crack in the wheel?

A. That was previous to a thorough examination.

Q. After you had heard it you did not think it was necessary to preserve the piece to establish the fact that there was no crack?

184 A. No, sir.

Q. But permitted it to be taken away?

A. It was lying there; I presume it was gathered up with scraps, as all such matters are.

Q. You say that this shaft that came out of the car just flayed a little splinter off of the side of the hole?

A. Yes, sir; about that long—about an eighth of an inch at the top, and thinned out as it went down.

Q. If that had not given away on the inside the weight of the wheel and this arm (indicating) and chain would necessarily have broken the arm going into the car, would it not?

A. This brace (indicating), and this brace (indicating) also, is what holds this brake in its place. This portion (indicating) rests merely on the inside of the timber for a down pressure; if the hole wears that strip of timber is taken out and another put in its place. This (indicating) is simply for the down pressure. When this (indicating) breaks off suddenly with a heavy pressure it would naturally break this arm off (indicating).

Q. That is your supposition?

A. That is my opinion from my knowledge of the business.

Q. I will ask you why it would break that off there (indicating)?

A. The snap would break it off.

Q. What would keep it from pulling out of the car?

185 A. The sudden snap would be as likely to break it off, even if there was no pin.

Q. You say the tension of the chain would have a tendency to break off that piece (indicating). If the tension was taken off by this (indicating) dropping down would not that take sufficient tension off so as not to break it?

A. The tension would be too sudden.

Q. How much tension would be taken off by the dropping down of the wheel?

A. The snap would be so sudden with the weight of the man with it.

Q. Is that sufficient to hold the weight of a man?

A. They do generally.

Q. Without that you would not get much power on the brakes?

A. They get power on the brake, but many of them are in the habit, after they set the brake up fairly tight, to get an additional new hold they swing their whole weight on it. Others, not being satisfied, carry sticks in their cabooses, and they carry it in their belts or through their suspenders, or they carry it in their hands to assist them with the brake.

Q. That is not allowed on your road, is it?

A. I have seen them do it; I guess it is not proper for them to do so. They heave a stick, and they run that between the spokes and swing out on it.

Q. Did you examine the shaft of the wheel that night that
186 went into the car to see whether there was a pin in there or not?

A. There was no pin in it.

Q. Was there a burr on the end of it?

A. No, sir.

Q. Was there any thread cut for the burr?

A. That I could not say.

Q. Is it not perfectly easy from the inside of a car to inspect and see if the brake is all right and in shape there?

A. From the inside?

Q. When the car is unloaded?

A. Of course, when it is unloaded it is.

Q. When the car is loaded is not it easy to inspect it?

A. Not when they are sealed cars. For instance, if that car was loaded at New York or Philadelphia——

Q. (Interrupting.) If the seals were off, and that car loaded as it was that night, would not it have been easy to inspect it?

A. When the car was loaded and sealed?

Q. If it was loaded as it was that night would not it have been easy to inspect it if the car door was open?

A. If the car was not sealed a man could go and inspect it; there is no question about that.

Q. You say the duties of the brakeman and trainmen are to generally look after the train, track, etc.?

187 A. To look after the property of the company, their own safety, the property of those in transit over the road, etc.

Q. To the best of their skill?

A. Yes, sir.

Q. Since this accident occurred you have printed rules for your company?

A. Yes, sir.

Q. And you have put this in particularly as one of the rules they must observe?

A. Yes, sir.

Q. Before that you had no written rule in regard to that?

A. Before that we had no written rule on that subject, and that is an extra precaution. When the railroad was first started we did not have half the rules we have to-day, and that very rule was added not any more for the interest of the company than for the protection of the employees.

Q. Is it not a fact that on account of this case you made that particular rule and printed it in 1883?

A. No; if we had done it on account of this particular case we should have done it immediately. It arose in that way. We found some of the employees were inclined to say that they did not think it was their duty; in other words, they did not have sense enough, and we had to put it down, and we printed the rule so as to call especial attention to it.

188 Q. Do you mean to say that the men you employ have not sense enough to attend to their business?

A. I did not say that. The same would apply to railroad employees as to others.

Q. Don't you, as a rule, try to employ the most sensible men?

A. Yes, sir; we are like all others. We all have some regulation and pay the same amount of salary, and, as a matter of course, seek out for the best men.

And further the witness saith not.

DANIEL M. HAYES, called for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. CHAPIN:

Q. Where do you reside?

A. I reside in Fort Wayne.

Q. What is your business?

A. I am a passenger conductor on the Grand Rapids and Indiana R. R.

Q. Where did you reside in 1881?

A. Fort Wayne, Indiana.

Q. Were you the conductor of this freight train on which the plaintiff was injured?

A. I was.

Q. What time did you leave Fort Wayne?

A. Our leaving time was 7.10, to the best of my recollection, and we left on about that time, I think.

Q. Where was your train going?

189 A. To what we called the east yard, Fort Wayne, Indiana.

Q. Did you go down there while the train was coming up and start with it from that place?

A. Yes, sir; I did.

Q. Was the plaintiff there?

A. Yes, sir.

Q. About what time did you go down?

A. I do not remember exactly that day, but usually about 30 minutes before leaving time.

Q. Then some time about half past six?

A. Yes; or 6.40.

Q. Do you recollect what kind of a day it was—whether it was clear or not?

A. Yes, sir; it was a clear day.

Q. State whether it was daylight or not when you started.

A. It was daylight.

Q. To what point did you get when it became dark that evening?

A. I could not say as to that. It was the 27th day of June, one of the long days.

Q. State whether you were on time.

A. Yes, sir; I left the yard but a few minutes late.

Q. Do you recollect the time you would have got to Huntington?

A. I could not say.

Q. What would have been your time?

A. I presume our time would have been 7.50 or 55.

190 Q. State what you know about this young man's injury at the time you got to Rome City.

A. This young man was what we call the rear brakeman, and as we came into Rome City he got out to make the stop for the water-tank, which is a regular stopping place for the trains to get water. He got out and was making his stop and set some two or three brakes, and I was sitting on the east side of the caboose and sitting inside, and I was not paying much attention to him; the evening was quite dark. I remember it very distinctly, and as we went down to the water-tank I noticed that we were getting a little bit by, and I looked out and I saw the headlight of the engine reflected on the tank and I saw that it passed, and just as we passed I heard somebody call me by name, and I listened a little bit and I looked out, and I could still hear it, and I got out on the ground and I could still hear somebody calling me by my given name, and it struck me that possibly my brakeman must have fallen out, and I went back to assist him, and I met the other brakeman and we went down and walked back to where we heard him call, and he was calling as we walked to him, and we went to him and took our cushion, and we found that he had fallen down the embankment at the edge of the water or lake there, and we went down and picked him up and laid him on the cushion and carried him down to the depot at Rome City.

191 Q. On which side was he?

A. On the east side of the track.

Q. Then you took him into the depot?

A. Yes, sir.

Q. Did you see the brake and the appliances?

A. No, sir. I did not pay any attention to the brake at all. I was very busy after we had taken him into the depot, of course; then the anxiety was to get medical aid for him. I went up to the hotel to get the porter, and while I was calling for the porter I heard Mr. O'Rourke get up, and he came out and called me by name and asked me what was the matter.

Q. Were you present when Mr. O'Rourke got up and examined the brake?

A. No, sir; I was not.

Q. Were you here yesterday when the plaintiff testified?

A. Yes, sir; I was.

Q. Do you recollect of calling out to him after the signal had been given for brakes that the train was going to get by him; that he could not handle it?

A. I made the remark to him as I was out standing on the platform of the caboose, I says to him, "Oscar, they are going to get away from you," and he just climbed up on the car and set the brake, and I was standing on the platform and I turned around and shut the caboose brake.

192 Q. Do you know how many cars in front of the caboose this car was?

A. It was the third car from the caboose.

Q. State how many brakes there were between that car and the caboose.

A. There were two brakes; there was a brake on each car between the caboose and the third car.

Q. How many brakes were there on this particular car?

A. Well, I could not say positively, but I presume there were two.

Q. The one an upright and the other an end brake?

A. Yes, sir.

Q. Did you go to Walcottville for Mr. Wilson?

A. Yes, sir; Mr. O'Rourke ordered us to go there.

Q. You may state whether this car was sealed or not.

A. That car was sealed; yes, sir.

Q. Have you got the original way-bill of that car?

A. My train-book is there; it shows the car was locked and sealed.

Q. State from what point to what point that car was billed.

A. It was billed from New York city to Kalamazoo, Michigan.

Q. In reaching the defendant's road at Fort Wayne what road did it pass over, the road immediately coming into Fort Wayne?

A. The P., F. W. & C.

193 Q. The Pittsburgh, Fort Wayne and Chicago R'y Co.?

A. Yes, sir; operated by the Pennsylvania Company.

And further the witness saith not.

LORENZO L. WRIGHT, called on behalf of defendant.

Direct examination by Mr. CHAPIN:

Q. State what were the duties of trainmen—of brakemen—upon those freight trains in regard to examining brakes?

A. Their duties were these: It was always understood that the duty of the brakeman was to look over the train to see that the couplings were properly made, and see that such brakes as they would be likely to use were in proper condition both for use and safety.

Cross-examination by Mr. KENNEDY:

Q. Such brakes as they would be likely to use?

A. Yes, sir; that they were likely to use.

Q. Not to examine the whole train?

A. It was not generally done; it was not understood that they had to examine every brake on the train, but such brakes that in all probability they would be likely to use.

Q. Where a train is going down hill very rapidly and down grade they sometimes use some brakes then they don't anticipate?

A. Yes, sir.

Q. Then, if an extra brake was called for, that would be
194 outside the brakes that they would be in the habit of using ordinarily with the train?

A. I can only speak from my own judgment in regard to such things. Knowing the road as I do, I should make an allowance ——

Q. (Interrupting.) You are simply speaking from your own judgment?

A. I should make an allowance for all grades and stops.

Q. You are not speaking from any rules?

A. No.

Q. But your own experience?

A. Yes, sir.

Q. And from your knowledge of the road?

A. Yes, sir.

By Mr. CHAPIN:

Q. In using the brakes what brake would the rear brakeman generally use?

A. He would use the brake that was handiest to get at from the caboose. He works from the caboose forward as many brakes that he would discover from the speed of the train would be required to hold it and the length of time and distance he would have to stop it.

And further the witness saith not.

Defendant rests.

The end.

And this was all the evidence given to the jury in said cause; and thereupon, at the proper time, the defendant moved the court

195 to give to the jury the following special instructions in writing, prepared and presented by the defendant, but the court refused to give each and all of said instructions, and did not give them nor either of them, and which instructions are in these words:

196 The defendant requests the court to give the following instructions to the jury in this cause:

1. The plaintiff sues the defendant to recover damages for injuries received by him in the discharge of his duties as a brakeman on a freight train while *in the discharge of his duties as a brakeman on a freight train while* in the employment of defendant.

The gist of the plaintiff's action is the negligence of the defendant railroad company. The burden of proving the alleged negligence rests on the plaintiff, and in order to recover he must establish, by a preponderance of the evidence—

1st. That his injuries were received by negligence of the defendant; and,

2dly. That his injuries were received without any fault or negligence upon his part that contributed to the same.

2. If you find that the weight of the evidence is in favor of the defendant, or even that it is equally balanced, then your verdict should be for the defendant.

3. If the plaintiff was in the employment of the defendant
197 railroad company at the time he received the alleged injuries the relation between the parties was that of master and servant, and the determination of the liability of the defendant involves the question of the duty of the defendant as master to the plaintiff as its servant.

4. As to the duty of defendant towards the plaintiff as employé at the time of the injury the court instructs you that the railroad company was not bound to provide cars or machinery that were absolutely safe.

5. The master does not guarantee to the servant the soundness of machinery nor insure against accidents.

6. The law imposed on the defendant only the obligation to use reasonable and ordinary care, skill, and diligence in procuring and furnishing suitable and safe machinery.

7. What is reasonable and ordinary care depends upon the particular circumstances of each case. In this case it is claimed by the defendant railroad company that the car which had the de-
198 fective brake, the giving way of which caused the plaintiff to fall off the car and thereby receive the injury, was a loaded car received from another company; that it was received at Fort Wayne loaded with freight for Grand Rapids, in the State of Michigan, and that the car when so received was sealed or fastened so that no inspection could be had upon the inside of the same as to the condition of the braking apparatus without opening and unloading the car, and that the defect, if there was any, could not be detected by ordinary and reasonable care in an external inspection, or, if it could, that the defendant had in its employ a competent inspector of cars at Fort Wayne whose duty it was to inspect the

same; that said car inspector was a fellow-servant of the plaintiff, and if there was any negligence upon his part it was the negligence of a fellow-servant, for which the defendant is not liable.

8. If there is evidence tending to establish these facts the court instructs you that the defendant is not responsible for latent
199 defects in the car or brake. By latent defects is meant such as could not be discovered by a careful and reasonable inspection.

9. If the car was received from another railroad company already loaded the defendant had a right to presume that the car was constructed of proper material and in a proper manner and that it had passed the inspection of some one of ordinary skill in such matters and was reasonably fit for the use to which it was devoted when so received.

10. It is not negligence for a railway company, in the ordinary course of business, to receive and transport loaded cars of other roads in general use, and if the defect in the brake or its appliances was not such as could have been discovered by a reasonable external examination, and there is no evidence that the defects were known to the defendant railroad company's proper officers or employees, it was not the duty of the defendant to unload the car to determine whether there were any defects or not. As already stated, the defendant had a right to presume there were none.

11. If the defendant railroad company had a competent
200 and careful inspector of the cars used on the defendant's railroad at Fort Wayne whose duty it was to examine the cars and see that the brakes were in good repair and safe condition, and the injury occurred through the failure or negligence of such inspector to perform his duty, then the court instructs you that the defendant is not liable for the injuries received by such negligence.

12. When the plaintiff entered into the service of the defendant as brakeman he undertook to run all the ordinary risks incident to his employment, including his own negligence or that of his fellow-servants who are engaged in the same line of duty, provided the company had taken reasonable care and precaution to engage competent servants to discharge the duties assigned them.

13. When the plaintiff engaged as a brakeman for the defendant he is presumed to have done so with a knowledge of and a taking of all the risks of its ordinary hazards, either from latent defects in the machinery and appliances or the ordinary dangers in using the same.

201 14. It was the duty of the plaintiff to see for himself that brakes and appliances which he was using were in repair, so far as this could be done under the circumstances of the case.

The defendant railroad company was under no higher duty or obligation to provide for the safety and protection of the plaintiff than the plaintiff was to have a care for his own safety.

15. The condition of the brake was a matter under the special care of the plaintiff as brakeman, and it was his business at all times to see that it was in a fit condition for use, so far as it was practicable for him to do.

16. If the evidence shows that the defendant was the owner of the car upon which was the brake the giving away of which it is claimed caused the injury to plaintiff, but that defendant had received it from another railroad company in the regular course of business loaded with freight, and the doors locked and sealed, so that it could not be opened without breaking the seals; that said car was
202 so received to be transported by defendant over its railroad to a point on its road, and that cars of the kind of the car in question were in general use on railroads throughout that section of the country and reputed to be safe and properly constructed, and there were no visible defects which might have been discovered by an ordinary inspection without breaking the seals and opening the car, and there were no visible defects in the material or the condition of the brake, and the defendant had no notice, knowledge, or information of any defect prior to the injury, it would not be negligence for which the defendant company would be liable, because the said car or its brake and attachments were manufactured of defective materials or in an improper manner.

17. If the plaintiff was guilty of any negligence or omission of duty that contributed to the injury he cannot recover.

CHAPIN & O'ROURKE,
Att'ys for Def't.

203 To which ruling of the court in refusing to give said instructions or any one of them to the jury the defendant then and there at the proper time excepted, and the court then of his motion instructed the jury as follows:

Charge of the Court.

GENTLEMEN OF THE JURY: I invite your attention while I give you such instructions in reference to the law of the case as I deem pertinent to the issues. Whatever I say in reference to the law it is your duty to accept and abide by. So far as questions of fact are concerned, the credibility of witnesses and influences to be drawn from the proofs, you are the sole judges.

The plaintiff in this case claims that, while employed as brakeman on the road of the defendant, he was injured by reason of the defective condition of the brake, causing it to become detached from the car and precipitating him under the wheels, and that the company was negligent in permitting the brake to be in this unsafe condition, and that by reason of this negligence the company is liable to him for the damage which he has suffered.

Now, there are certain principles of law applicable to such questions, and I proceed to give them, as I deem them pertinent to the present inquiry:

204 The defendant, by reason of having employed the plaintiff to work for it as a brakeman upon its road, became bound by certain duties to the plaintiff. Its duty was to furnish safe machinery for the plaintiff to operate with. This duty, as has been expressed, is said to be important, and the degree of diligence in its

performance the greater in proportion to the dangers which may be encountered, and it has otherwise been expressed as a "high" duty.

The duty to an employee, however, is not the same as that to a passenger. A carrier of passengers is bound to exercise the highest degree of diligence practicable. The duty to an employee is not so high as that. It has simply to exercise what, under the circumstances, is reasonable diligence to secure the safety of its employees. The employee, on the other hand, when he takes employment upon a railroad or in connection with machinery of a dangerous character, assumes the danger of the ordinary risks incident to the business. It is implied in his contract of employment that, if he suffers an injury by reason of any ordinary accident incident to the business and which was not caused by the negligence of the company, he takes the consequences upon himself, and he has no right of action against the company.

Now, the particular negligence charged against the defendant in this instance is that it suffered a defective brake to remain on
205 one of the cars upon which this *defendant* was employed. It is claimed that the brake was defective in three particulars, viz., in the rim, in the brace, and in the failure to have a pin in the end of the axle, which passed into the car. The implement has been presented and so described before you that I have no doubt that you know to what I refer.

Now, then, the burden of proof is upon the plaintiff to show—

1. That he suffered an injury; about that there is no question.

2. That there were defects in the brake, such as he has described in his complaint or some of them.

3. That these defects either caused or contributed to causing the injury which he suffered.

4. (Which presents, perhaps, the principal question in the case.) That the defendant either knew or ought to have known of the existence of these defects, and was guilty of negligence in not having them corrected.

Now, then, passing by the first proposition (the injury), about which there is no question, the second is, What flaws were there in this brake? It is claimed that there were some in the rim. Well, if there were, did those contribute to the injury? If they did, then it may be material to consider them. If they did not they may be passed by as immaterial. Were there any flaws in the rim,
206 and do you believe that if there were that they had anything to do with this accident? Did the rim break in the hands of the brakeman, or was it broken after the accident and by reason of being cast down on to the railroad track? If the latter, then the flaws in the rim would be immaterial, except possibly in this aspect, namely, in determining the question whether or not the company was negligent in finding out the other flaws which really caused the injury, if there were any such; but, observe, not necessarily that. It might be that the company observed the flaws or its agent who inspected the car (and I will speak of the agent at Fort Wayne, because that is palpably the place where the inspection ought to

have occurred in this case, and it is not disputed in evidence that the defendant did employ inspectors at Fort Wayne, viz., the employees of the Pennsylvania Company, to inspect for it, and in respect, therefore, to that inspection this company became liable for the employees of the Pennsylvania Company the same as though they had been its own employees); then I say, even supposing there were defects in the rim, yet if they were not such as to apprehend any danger reasonably to be expected, they might have been passed by as immaterial and affording no cause to suspect the existence of other flaws in other parts of the machine; but that is a ques-
207 tion of fact for you to determine, and I will come to the bearing of it further along.

Of course, if the flaws in the rim did contribute to the injury, did tend to bring about this accident, and the company ought to have seen those flaws, but through the negligence of its employees failed to see them, the company is responsible for that negligence.

Passing from the rim to the brace, the testimony doubtless satisfies your mind that the brace broke, and probably that this in a large degree contributed to the injury, if it was not the primary and main cause of it.

Now, then, there is a dispute between counsel and a difference between witnesses upon the question whether there were signs of an old flaw in that brace. Some of the witnesses have testified, some by deposition and some personally before you—one or two perhaps—that they saw evidences of a flaw in that piece of the brace that fell down upon the ground. On the other hand, Mr. O'Rourke has appeared before you, and has testified that he examined that piece of the iron more particularly than the others by applying his nail to it, and that further to satisfy himself he examined the other piece of the iron which remained attached to the car, and he says that there was no flaw.

Now, gentlemen, here is a question of fact and, perhaps, the first material question of fact for you to determine: Was there a
208 flaw there or not? It is for you, as sensible men, to take this testimony and say what you believe to be the truth in that respect.

Was there a flaw in the iron? Well, if there was not, then, of course, there is no liability arising against the company on that account, unless the material itself was so defective as to be easily broken, but unless that fact was known to the company there would be no liability on that account, and of this it is hardly necessary to say there is no claim in this case.

Was there a flaw there? If there was it will be necessary for you to inquire further in reference to the bearing of that fact upon the case. If you find that there was a flaw you will doubtless readily say that that tended to produce the accident; if you find that there was not such a flaw, of course you must look for some other source or cause for the accident.

If you find that there was such flaw the next thing to determine will be whether or not the company knew or ought to have known of it, because the mere fact that there was a flaw there does not

make the company liable. The fact that the plaintiff was injured does not make the company liable. The fact that there was a flaw in the rim does not make the company liable. Those are necessary steps, perhaps, in making out a case to make the company liable.

209 Was the flaw such that the company knew or ought to have known, through the agency of its inspectors at Fort Wayne, the Pennsylvania men? If it was, then you will have a right to hold the company responsible for it. If it was not, then the company is not liable, unless it is affirmatively shown that they failed to make a proper inspection.

Now, of course, the starting point of liability against the company is the failure properly to inspect the cars. That is the pivot of the question of liability or non-liability. Did the company make an inspection; and, if it made one, did it make a sufficiently careful one? If it did not make an inspection and thereby the flaw was overlooked the company is liable, unless there was contributory negligence on the part of the plaintiff; but of that I will speak further on.

Now, then, there is no direct evidence here on the question whether an inspection was made or not. The burden of proof is upon the plaintiff to show that the company failed to do its duty in reference to this defective axle, if there was a defective one. The company's duty was to make a proper inspection before it allowed the car to start out of its yard.

While the burden of proof of the failure to make the inspection is upon the plaintiff, he is not bound to make direct proof. If he has proved a flaw of such a character as to convince your

210 minds that if a proper inspection had been made it would have been discovered, then you have a right to infer from the flaw proven to be of this character that the company made no inspection, or, if it did make one, it made a careless one, and in either case the liability of the company will be established. In other words, it is the negligence of the company in failing to make a proper inspection of the car before they started it on its way that makes the company liable.

If, from the proof in reference to the flaw, if there was one, you are satisfied that the company either made no inspection or made a careless one, then the company is liable for that flaw. If the proof does not satisfy your mind of that fact, then the company is not liable for the flaw nor for the consequences of it.

Passing by these two grounds, it is claimed again that there was a defect by reason of there not having been a linchpin on the end of the axle on the inside of the car.

I may say to you now that the company was not an insurer of the safety of the machinery and of the soundness of the machinery. It was bound to exercise high care and reasonable diligence to secure its safety and soundness, and it is only for the failure to exercise such care that it is liable. The company is not liable for the failure to discover hidden defects which a reasonable inspection would not be likely to discover.

211 The question has been argued before you of the liability of the company for a car received from another road. The amount of diligence and care is always one of fact for the jury under the circumstances of the case. The company is not bound to do an unreasonable thing. The reason why goods are put in sealed cars, so far as I recollect, has not been explained by any witness, and you have a right to invoke your general knowledge as men of business in considering evidence of that kind.

If the practice or custom of the railroads, for the convenience of commerce and for the shipping of goods in particular cases, is to seal the cars and send them through to their destination without opening them—and experience has shown that that can be done with reasonable safety—the company was not bound to break the seal and open the car in order to find such a defect on the interior, and I submit it to you as a question of fact (it is a question of fact for the jury under the circumstances of each case) whether or not in this instance the company was guilty of the want of ordinary and proper care in failing to know, if it be a fact, that there was no pin in that axle when it left the yard at Fort Wayne.

The company does not warrant nor become the guarantor that cars thus received from another road are in a safe condition.

212 It is bound, however, to make a reasonable examination; and, so far as concerns the exterior of the car, the machinery on the outside and under it, the brakes, etc., as they were visible and could be gotten at, I instruct you that it was their duty to inspect them, and when that car came into their yard from the Pennsylvania road to make such examination as it reasonably could of the machinery, the brakes, and other external parts.

There has been something said of the duty of this plaintiff himself to have made the examination in question. To a certain extent that duty rested upon him, and it is for you to say, under the evidence, to what extent he was chargeable with that duty.

It is clear from the evidence that the company did not rely wholly upon him, because the proof is that they had inspectors whose special duty it was, after receiving a car into the yard, to determine whether it was in a condition to go out.

Of course, a brakeman who takes charge and operates a brake must, to a certain extent, be held responsible to observe and see the condition of the machinery, and if he failed of his duty in this respect, did not do what, under the circumstances, he ought to have done, and thereby and by reason of that he suffered an injury which he would not have suffered if he had done his full duty, then he has no right to recover, even though the company

213 was negligent, because a man cannot recover damages for an injury for which he is in part in fault himself, no matter what the negligence of the other party is.

But the evidence is, and it is a conceded fact, that the railroad company did employ men to make an inspection of the cars before they were started out, and the question, if you find that this plaintiff was without fault himself, is, under the instructions that I have been giving you, whether the defendant was guilty of negligence in

respect to this brake; if it was, if it failed to exercise what, as reasonable men, you would say was the care demanded of it in the premises, then it became liable for the consequences; if it was not negligent, then it was not liable.

This is, gentlemen, all I desire to say to you in respect to the law of the case. If you find for the defendant of course there will be no further question for you to consider. If you find for the plaintiff, then the question will be how much damages shall be awarded. That is a matter which, in the main, I leave to the sound discretion of the jury. So far as damages capable of actual measurement are concerned, it is your duty, if you find the plaintiff is entitled to damages at all, to allow them; that, of course, has reference to medical attendance, actual expenses incurred by reason of the injury,
214 and actual loss of time during the time of disability, and so far as it can be computed in the ordinary modes of determining those things it is your duty to absolutely allow therefor.

But when you get past these elements of damages there are the bodily and mental suffering which were the result of the injury (and when I say mental suffering- I do not mean that anxiety which may have been caused the plaintiff with regard to his condition and grief that he may have felt on account of being disabled, but the mental pain and agony which were the natural and necessary result of the injury). Those you compensate for, and as the young man has lost his foot and ankle and part of his leg that may be taken into consideration, as it will affect him in the future, as it will affect his capacity to do business and to earn a living; and in considering all these phases of the question, if you find him entitled to damages, you will award him what you think is a reasonable and fair compensation. Of course, there is no such thing as measuring it out dollar for dollar as you could the price of wheat per bushel. You cannot get at it that way. It is simply the discretion of the jury brought to bear upon the facts to determine by a sound judgment what is a fair compensation.

215 And to so much of said charge of the court as charged the defendant was liable for the omission of the inspectors to make a proper inspection of said car and its brakes by the giving away of which the plaintiff was injured, or for the omission of any duty upon the part of said inspectors, irrespective of whether they were fellow-servants with the plaintiff or not, the defendant then and there excepted.

And be it further remembered that the above and foregoing were all the instructions given by the court in said cause; and be it further remembered that the jury having returned a verdict for the plaintiff the defendant at the proper time moved for a new trial on written reasons filed, which motion was by the court overruled, and the defendant then and there excepted, and the court gave the defendant sixty days from the 5th day of December, 1883, within which to file his bill of exceptions, setting forth the above rulings and the evidence, and the court then rendered judgment upon said verdict.

And be it further remembered that afterwards, to wit, on the 25th day of January, 1884, and within the time given by the court, the defendant now here presents this his bill of exceptions, which is now signed and sealed by the court and made a part of the record in this cause as of the date at which said rulings were made and exceptions taken.

[SEAL.] W. A. WOODS.

216 And afterwards, to wit, at the November term of said court, on the 6th day of February, 1884, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, The Grand Rapids and Indiana Railroad Company, by counsel, and files its appeal bond herein in the sum of twelve thousand dollars, with W. R. Shelby and William Parry as sureties thereon, and said bond is accepted and approved by the court.

217 UNITED STATES OF AMERICA, } ss:
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy and transcript of the record and proceedings in the above-entitled cause in said court as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said circuit court, at Indianapolis, in said district, this 23d day of February, A. D. 1884.

NOBLE C. BUTLER, *Clerk.*

[Seal Circuit Court of the United States, District of Indiana.]

218 UNITED STATES OF AMERICA:

The President of the United States of America to the judge of the circuit court of the United States for the district of Indiana, Greeting:

Because in the record and proceedings as also on the rendition of a judgment in a plea which is in the said circuit court before you, between The Grand Rapids and Indiana Railroad Company, a citizen of the State of Indiana, plaintiff in error, and Osman Liles, a citizen of the State of Ohio, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by her complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further

to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 25th day of January, A. D. 1884.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

219 UNITED STATES OF AMERICA:

To Osman Liles, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to writ of error filed in the clerk's office of the circuit court of the United States of the district of Indiana, wherein The Grand Rapids & Indiana Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 25th day of January, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

220 On this 25th day of January, in the year of our Lord one thousand eight hundred and eighty-four, personally appeared —— —— before me, the subscriber, —, and makes oath that he delivered a true copy of the within citation to —.

—— ——.

Sworn to and subscribed the — day of ——, A. D. 187–.

—— ——.

Service of notice of the within citation is hereby waived this 25th day of January, 1884.

OSMAN LILES,
By KENNEDY & STEEN &
THOMPSON & MARSH,
Pl'ff's Att'ys.

Endorsed on cover: Indiana C. C. U. S. No. 88. The Grand Rapids and Indiana Railroad Company, plaintiff in error, *vs.* Osmun Liles. Filed 11th October, 1884.

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CLERK.

Brief for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

NO. 88.

THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

OSMUN LILES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

T. J. O'BRIEN,
J. H. CAMPBELL,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1887. NO. 88.

THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY,
Plaintiff in Error,
vs.
OSMUN LILES.

Brief of Counsel for Plaintiff in Error.

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PART I.—STATEMENT OF CASE AND POINTS INVOLVED.

1. Statement of Case.

This case comes before this court upon writ of error to the Circuit Court of the United States for the Seventh Circuit and District of Indiana, for review of its judgment rendered upon verdict in the cause above entitled.

Osmun Liles, plaintiff below, brought this suit to recover damages for personal injuries alleged to have been sustained by him while he was in the employ of the said Railroad Company as a brakeman upon a freight train, June 27, 1881, at Rome City, Indiana. It is alleged that a brake gave way while he was setting it upon a car in a moving freight train; that in consequence thereof he fell onto the track and the wheel passed over his foot, inflicting such injury that amputation was necessary.

The suit was commenced July 17, 1882, in the Circuit Court for Randolph County, Indiana.

June 14, 1882. Complaint was filed in the State Court. (Printed record, pp. 1–4.)

Sept. 7, 1882. Demurrer to complaint filed in State Court. (Pr. Rec., p. 6.)

Nov. 23, 1882. Demurrer to complaint overruled by State Court (Pr. Rec., p. 8.)

" 23, 1882. Defendant's answer, par. 1, 2, filed. (Pr. Rec., p. 8.)

" 24, 1882. Demurrer to par. 2 of answer filed. (Pr. Rec., p. 9.)

Dec. 7, 1882. Answer, par. 3, filed. (Pr. Rec., p. 9.)

" 7, 1882. Demurrer to answer, par. 3, filed. (Pr. Rec., p. 10.)

" 8, 1882. Cause removed by plaintiff to the Circuit Court of the United States for the District of Indiana. (Proceedings Pr. Rec., p. 10–14.)

Sept. 17, 1883. Demurrer to answer, par. 2 and 3, sustained by United States Court. (Pr. Rec., p. 15).

Dec. 3, 4 and 5, 1883. Case tried in U. S. Court at Indianapolis, Hon. William A. Wood, District Judge, presiding, by jury. Verdict for plaintiff. Damages assessed at $6,000. Judgment. (Pr. R., pp. 17–19.)

2. Points Involved. Preliminary statement.

The car to which the brake in question was attached belonged to another Company. It was in transit from New York City to Kalamazoo, Michigan, loaded and sealed. It was by defendant received from a connecting but independent line, at Fort Wayne, Indiana, and forwarded to the place of destination.

There is no question as to the *character* of the brake. The question is as to its *condition* when received and forwarded by defendant.

There is no proof that the defendant, or any of its officers or agents, knew of the defect in the brake if there was one.

It is undisputed that defendant made provision for the inspection of such cars at Fort Wayne, and no question is made respecting the competency of the persons whose duty it was to make such inspection.

The defendant claims that it was, by its rules, made the duty of brakemen themselves to inspect the brakes upon their trains. It also appears that defendant had made an agreement with the Pennsylvania Company that the inspectors of the latter, at Fort Wayne, should inspect defendant's cars.

The plaintiff in error contends that the following points are essential to a recovery in this case:

1. That there was some defect in the brake at the time the car was in the yards at Fort Wayne, and taken into the defendant's train.

2. That the giving way of the brake, while defendant was operating it, resulted from such defect.

3. That the defect was of such a character that it ought to have been discovered by a proper inspection.

4. That some person or persons, other than plaintiff, were appointed by defendant, and charged with the duty of making an inspection of such brakes, and that the plaintiff himself was not (alone or with others) charged with such duty.

5. That such persons (1) failed to make an inspection of the brake, or (2) made an inspection in so careless a manner that they did not discover such defect, or (3) having discovered it, failed to have it re-

paired, and suffered the car to go out of the yard in that defective condition.

6. That such persons were not fellow servants of the plaintiff in the sense that would bar a recovery by him for injuries resulting from their negligence.

7. That defendant is chargeable with their negligence, and answerable therefor to plaintiff for such injuries.

8. That plaintiff was not guilty of negligence which contributed to the injury.

(1). With respect to an inspection of the brakes.

(2). With respect to his use of the brake.

3. Points Involved. Statement of.

The plaintiff in error rests its defence, and asks a reversal of the judgment upon this record, upon the following propositions, which it understands to be the points involved. The manner in which they are raised is stated. The assignments of error referred to are those contained in the brief *post*.

1. The proofs establish the fact that the defendant made adequate provision for the inspection, by competent persons, of cars received by it from connecting lines, at Fort Wayne, before they were forwarded upon defendant's line. The defendant thereby discharged its full duty to plaintiff with respect to such cars, and is not answerable for the negligence of such inspectors.

This point is raised by

(*a*) 11th request, page 93 Pr. Rec., 1st assignment of error.

Refusal and exception, page 94 Pr. Rec.

(*b*) Answer, par. 2, page 8–9, Id.

" 3, " 9–10, Id.

Demurrer, page 9–10, Id.

Sustained and exception, page 15, Id. 2d assignment of error.

2. It is established by the proofs that the defendant paid the Pennsylvania Company for the inspection of defendant's cars at Fort Wayne, and the Pennsylvania Company employed the inspectors.

Defendant claims that the proofs also establish the fact that the rules of the defendant Company required brakemen to look after, *i. e.*, inspect the condition of their train in all respects, and (conceding that the liability of defendant for the Pennsylvania inspectors is the same as if they were its own) that the defendant is not liable to plaintiff in this case, if there was negligence in not discovering the flaw, if any, in the brakes, for the reason that the plaintiff himself is fully chargeable with such negligence. It cannot be said that any of the others were to blame any more than he was. It was as much his duty as their to make an inspection and discover the defect.

This point is raised by

(*a*) Request No. 14, Pr. Rec., p. 93, 7th assignment of error.

(*b*) Request No. 15, Pr. Rec., p. 93, 8th assignment of error.
Exception to refusal of, p. 94, Pr. Rec.

(*c*) Answer. par. 2, on p. 9, Pr. Rec.
Demurrer thereto, p. 9, Id.
Sustained and Exception, p. 15, Id. 2d assignment of error.

3. If the others and not plaintiff were guilty of negligence, defendant is not chargeable with such negligence, so far as plaintiff is concerned; for the reason that they were fellow servants of his in the sense that exempts the Company, so far as he is concerned from the consequences of their negligence.

This point is raised by

(*a*) Request No. 11, Pr. Rec. 93, 1st assignment of error.

(*b*) Request No. 12, 4th assignment of error.

(*c*) Request No. 7, 3d assignment of error.
Exception to refusal of, page 94, Pr. Rec.

(*d*) Instructions of the court stated in 5th and 6th assignments.
Exception, page 99, Pr. Rec.

(*e*) Answer, par. 3, on page 10, Pr. Rec.
Demurrer thereto sustained, exception, page 15, Pr. Rec. 2d assignment of error.

4. The court was asked to instruct the jury that if they should find

that the weight of evidence was in favor of defendant, or that it was equally balanced, their verdict should be for the defendant. The request was refused.

(See 9th assignment of error, exception, page 94, Pr. Rec.)

5. The plaintiff caused the depositions of David L. Mason, Joshua S. Rhinehart, George W. Moore and others to be taken at Rome City, Indiana. The same were introduced and read in evidence.

(Pr. Rec., pp. 52, *et seq.*)

Defendant's counsel moved to suppress these depositions for the reason, among others, that there was nothing to show or inform the court that the person who took said depositions had any authority to take said depositions or to take depositions at all.

(Motion, page 15, 19. Denied and exception, pages 17, 20, Pr. Rec.)

The person who took the deposition states in his certificate that he was a Justice of the Peace. No other evidence of the fact appears in the record.

(Assignment of error X.)

6. The witness Mason (deposition, Pr. Rec., p. 52) testified that he resided at Rome City at the time of the accident, and went to the scene of the accident after it had occurred. He was asked to state as to the examination he made of the wheel, and who were present. He answered that there were several present; that a good many were there looking at the wheel, and they were all talking about the wheel and the flaw in it. Defendant's counsel moved to suppress and strike out this answer. The motion was denied. Defendant excepted.

(Motion, page 15, 20. Denied and exception, page 17, 22. Assignment of error XI.)

7. The witness Rhinehart (deposition page 56,) testified that he resided at Rome City at the time of the accident. That he went to the scene of the accident the same evening after it had occurred and testified as to making an examination of the wheel. He was asked to state as to the examination which he made and the condition of the wheel. He answered that he was out there and the Superintendent of the road

and he examined the wheel; that witness spoke and said there was a flaw in it; the superintendent picked it up and looked at it and said he didn't see any flaw; that witness showed him, and said to him what witness thought was a flaw by the looks of it. Defendant's counsel moved to suppress and strike out this answer. The motion was denied.

(Question and Ans., page 57. Motion, page 16, 21.)

(Denied and exception, pages 17, 22. Assignment of error XII.)

8. The same witness, in answer to another question whereby he was asked to state what there was to indicate the break or flaw, answered:

"What I claimed the flaw was an old crack with a dead look, while the balance of the brake was new and bright."

Defendant's counsel, in the same motion (pages 16, 21) moved to suppress and strike out this answer.

(Denied and exception, pages 17, 22. Assignment of error XIII.)

9. The witness George W. Moore (deposition, page 58) testified that he lived at Rome City at the time of the accident; that about six o'clock in the morning after the accident he saw pieces of a brake wheel near the depot. Witness was asked the following question: "Q. You may state whether or not you made an examination of this brake-wheel to determine whether or not the same had been whole and perfect before the happening of the accident?" The subject was pursued by the two succeeding questions. Witness answered that he did make such examination; that he noticed a flaw; that he could tell the flaw by the rust.

(Questions and answers, pp. 58–59.)

Defendant's counsel in the same motion moved to suppress and strike out these answers.

(Pages 16, 21. Denied and exception, pp. 17, 22. Assignment of error XIV.)

10. Nicholas Marks was called as a witness on the trial, and testified that he was general foreman of the car department of a certain railroad company. He was asked to state the proper construction of one of these brakes, and how it was properly applied to the car.

(Questions number 13 and 14, pages 47 and 48.)

Defendant's counsel objected. The objection was overruled, and the witness permitted to testify upon the subject matter of the questions.

(Record, pages 48–49. Assignment of Error, XV. and XVI.)

11. The court, by requests number 9 and 10 (page 93 of record) was asked to instruct the jury that the car having been received from another company loaded, the defendant had a right to presume that it was constructed of proper material and in a proper manner, and had passed inspection in such matters, and that it was not the duty of defendant to unload it to determine whether there were any defects or not. This the court refused to do.

(Exception, page 94. Assignments of error XVII. and XVIII.)

The following points stated in paragraphs numbered 12, 13 and 14 are not based upon any exception, but we think that an examination of the record and bill of exceptions will satisfy the court that the points are well taken.

Briefly stated, the points are that there is no evidence in the case tending to show, or from which it could be inferred that there was any open defect in the brake, nor that the giving way of the brake resulted from such defect. Also that the allegations in the complaint are such that defects considered must be confined to those in the wheel, and that it was error to submit to the jury the question whether there was a defect in other parts of the apparatus.

It is stated in the bill of exceptions that all the evidence given to the jury on the trial appears in the bill.

(Pr. Rec., p. 91.)

The complaint and instruction given to the jury also appear.

We submit to the court the question whether, in the absence of spe-

cific exceptions, we may assign error, in respect to these matters, and have the points considered by this court.

We make this suggestion upon the authority of

Rule 21, par. 4, which provides,

That the court, at its option, may notice a plain error not assigned or specified.

Storm vs. United States, 94 U. S., 76, wherein it was said, that

"The rule is that whenever the error is apparent in the record, whether it be made to appear by bill of exceptions, an agreed statement of facts, or by demurrer the error is open to re-examination and correction. Whatever error of the court is apparent in the record, whether it be in the foundation, proceedings, judgment or execution of the suit may be re-examined and corrected."

See pp. 76–77. Also, page 81.

Slacum vs. Pomeroy, 10 U. S., (6 Cranch,) 221,

Wherein it is held, that it is not too late to allege, as error in the appellate court, a fault in the declaration which ought to have prevented the rendition of judgment in the court below.

The only evidence in the case which could be invoked to support the inference that there was a patent defect in the brake, and that such defect caused the brake to give way is,

1. The fact that it did give way.

2. Testimony as to the condition of the wheel, etc., *after* the accident.

This testimony we have collated and present in full in the argument. We believe that it is such that we are warranted in saying that it is insufficient as foundation for the inference of the two essential facts above stated.

The points which we seek to have considered are the following:

12. There is no evidence in the case tending to show, or from which it could be inferred that there was a defect in the brake while it

was in the yard at Ft. Wayne, which ought to have been discovered by a reasonable inspection.

13. There is no evidence in the case tending to show, or from which it could be inferred that the giving way of the brake resulted from any defect which existed while the car was in the yard at Fort Wayne.

14. It was error for the court to submit to the jury the question whether there was a defect in the brace.

(*a*) There is no allegation to support it.

(*b*) There is no evidence to support it.

While it is stated in the complaint that there were certain defects in the brake, it is further stated in both paragraphs that the breaking of the wheel and rim caused the brake to give way. The statement in par. 1, page 3, is, "said wheel and rim of said brake broke and parted and threw plaintiff to and upon the ground and on the railroad track."

The statement in paragraph 2, page 4, is "The wheel or rim of said brake broke and separated, and by said breaking and separating threw plaintiff upon the ground."

By these allegations negligence could be predicated only of some defect in the wheel and rim. It was error for the court to submit to the jury the question as to a defect in the brace.

The instructions appear on p. 96, wherein the court said: "Passing from the rim to the brace the testimony doubtless satisfies your mind that the brace broke, and probably that this in a large degree contributed to the injury, if it was not the prime and main cause of it," and what follows upon the same subject. All the evidence is stated in the argument.

PART II.—SPECIFICATION OF ERRORS RELIED ON.

I.

The court erred in refusing the defendant's 11th request, as follows:

"11. If the defendant railroad company had a competent and careful "inspector of the cars used on the defendant's railroad at Fort Wayne,

"whose duty it was to examine the cars and see that the brakes were "in good repair and safe condition, and the injury occurred through "the failure or negligence of such inspector to perform his duty, then "the court instructs you that the defendant is not liable for the injuries "received by such negligence."

Page 93. Exception, page 94.

II.

The court erred in sustaining the demurrer to the 2d and 3d paragraphs of the answer.

Paragraph 2, Pr. Rec., pages 8 and 9.

Demurrer, Id., Page 9.

Paragraph 3, pages 9 and 10.

Demurrer, page 10.

Demurrer sustained and exception, page 15.

III.

The court erred in refusing the defendant's 7th request, Pr. Rec., page 92, as follows:

"7. What is reasonable and ordinary care depends upon the par- "ticular circumstances of each case. In this case it is claimed by the "defendant railroad company that the car which had the defective "brake, the giving way of which caused the plaintiff to fall off the car "and thereby receive the injury, was a loaded car received from an- "other company; that it was received at Fort Wayne loaded with "freight for Grand Rapids, in the State of Michigan, and that the car "when so received was sealed or fastened so that no inspection could "be had upon the inside of the same as to the condition of the braking "apparatus, without opening and unloading the car, and that the de- "fect, if there was any, could not be detected by ordinary and reason- "able care in an external inspection, or, if it could, that the defendant "had in its employ a competent inspector of cars at Fort Wayne, whose "duty it was to inspect the same; that said car inspector was a fellow- "servant of the plaintiff, and if there was any negligence upon his "part, it was the negligence of a fellow-servant, for which the defend- "ant is not liable."

Pr. Rec., pages 92, 93. Exception, page 94.

IV.

The court erred in refusing the defendant's 12th request, Pr. Rec., page 93, as follows:

"12. When the plaintiff entered into the service of the defendant "as brakeman, he undertook to run all the ordinary risks incident to "his employment, including his own negligence or that of his fellow-"servants, who are engaged in the same line of duty, provided the "company had taken reasonable care and precaution to engage com-"petent servants to discharge the duties assigned them."

Pr. Rec., page 93. Exception, page 94.

V.

The court erred in instructing the jury as follows:

"Of course, if the flaws in the rim did contribute to the injury, did tend to bring about this accident, and the company ought to have seen those flaws, but through the negligence of its employes failed to see them, the company is responsible for that negligence."

Pr. Rec., p. 96, exception, p. 99.

VI.

The Court erred in instructing the jury as follows:

"Was the flaw such that the Company knew or ought to have known through the agency of its inspectors at Fort Wayne, the Pennsylvania men? If it was, then you will have a right to hold the company responsible for it."

Pr. Rec., 97. Exception, p. 99.

VII.

The court erred in refusing the defendant's 14th request, as follows:

"14. It was the duty of the plaintiff to see for himself that brakes "and appliances which he was using were in repair, so far as this "could be done under the circumstances of the case. The defendant "railroad company was under no higher duty or obligation to pro-

"vide for the safety and protection of the plaintiff than the plaintiff "was to have a care for his own safety.

Pr. R., p. 93. Exception, p. 94.

VIII.

The court erred in refusing the defendant's 15th request, as follows:

"15. The condition of the brake was a matter under the special "care of the plaintiff, as brakeman, and it was his business at all "times to see that it was in a fit condition for use, so far as it was "practicable for him to do."

Pr. Rec., p. 93. Exception, p. 94.

IX.

The court erred in refusing the defendant's 2d request, as follows:

"2. If you find that the weight of the evidence is in favor of the "defendant, or even that it is equally balanced, then your verdict "should be for the defendant."

Pr. Rec., page 92, exception, page 94.

X.

The court erred in refusing defendant's motion to suppress the depositions of David L. Mason, and others, for the reason that there is nothing to show or inform the court that the person who took said depositions had any authority to take said depositions, or take depositions at all.

See motion, Pr. Rec., page 15; also on page 19. Exception, pages 17, 20.

XI.

The court erred in refusing defendant's motion to suppress and strike from the deposition of the witness David L. Mason, the answer following: (Page 53.)

"Q. State who, if any one, was present with you when you examined this wheel, and what light, if any, you had with which to make the examination of the said wheel or rim.

A. There were several present. Mr. Joshua Rhinehart was one,

Mr. P. S. O'Rourke. I knew of a good many that were there looking at the wheel; they were all talking about the wheel and the flaw in it. There was a lantern there and a light at the corner that gave light." For the reasons stated in the motion, (Pr. Rec., page 16,) that what witness said at the time he made the examination, is inadmissible as original evidence.

Exception, pages 17, 22.

XII.

The court erred in overruling the motion of defendant's counsel to strike out question and answer number 6½ in the deposition of Joshua S. Rhinehart, for the reason that there is nothing in said testimony, nor in his deposition, to show that the brake wheel he testified about was the one the breaking of which caused the injury complained of. And for the further reason that the cross-examination shows, by the answers of the witness, that he had not the requisite knowledge and experience to give his opinion as to the character or cause of the break. And for the further reason that it is not competent to testify and give in evidence the conversations between him and the said O'Rourke, which embrace the opinion of the witness, as then expressed, because it is not shown that said O'Rourke assented to it, and if he did, he had no power to bind the defendant by any admissions of that character, it not being a part of the *res gestæ*.

Motion, p. 16. Question and answer, p. 57.

The question and answer found on page 57 are as follows:

"Q. What examination, if any, did you make of the part or parts of the broken wheel or rim, and what was the condition of the same, with reference to its soundness or unsoundness?

A. I was out there and Mr. O'Rourke, superintendent of said road, and I examined the wheel at the same time; he had a lantern; we looked at the wheel and I spoke and said there was a flaw in the wheel. He picked it up and looked at it, and he said, 'I don't see any flaw in it.' I showed him and said to him what I thought was a flaw by the looks of it; the flaw seemed to strike in quite a ways."

Exception, p. 17, 22.

XIII.

The court erred in overruling the motion of defendant's counsel to suppress and strike out of the deposition of said Rhinehart the question and answer, number 11: Because there is nothing in said testimony nor in his deposition to show that the brake wheel he testified about was the one the breaking of which caused the injury complained of; and for the further reason that the cross-examination shows by the answers of the witness therein that he had not the requisite knowledge and experience to give his opinion as to the character or cause of the break; and for the further reason that it is incompetent for the witness to state what he might have claimed at the time, as to the character of the break or flaw. Motion, page 16; question and answer, page 57, are as follows:

"Q. State what, if anything, there was to indicate how far the break or flaw extended into the rim of the brake wheel.

A. What I claimed, the flaw was an old crack with a dead look, while the balance of the brake was new and bright."

Exception, p. 17, 22.

XIV.

The court erred in refusing defendant's motion to strike out of the deposition of George W. Moore the questions and answers as follows:

Pr. Rec., pp. 58, 59.

"Q. You may state whether or not you made an examination of this broken brake wheel, to determine whether or not the same had been whole and perfect, before the happening of the accident.

A. I did.

Q. What indication, if any, did you observe of its dangerous condition previous to its breakage the night before?

A. I noticed a flaw in the rim of the wheel two-thirds of the way through the wheel.

Q. What did you observe in the appearance of this broken rim or wheel that indicated the flaw you have spoken of?

A. You could tell by the old brake; it was rusted two-thirds through the wheel, while the rest was bright.

For the reason that there is nothing in the testimony of the witness to show that the brake wheel testified about is the one which broke and caused the injury to plaintiff, and because the witness, in said answers, gives his opinion as to the condition of said wheel before it broke, he not being an expert; and because he does not give the facts upon which his opinion is based.

Motion, pages 16, 17 and 21; exception, pages 17, 22.

XV.

The court erred in overruling the objection of defendant's counsel to the question, number 13, (record, p. 47) put to plaintiff's witness, Nicholas Marks, and in permitting the witness to answer the same, and to testify upon the subject matter thereof. The question is as follows:

"Now, just state to the jury how these— What is the proper construction of one of these brakes, and how is it properly applied to one of the cars?"

Exception, p. 48.

XVI.

The court erred in overruling the objection of defendant's counsel to the question, number 14, (record, p. 48) put to Nicholas Marks, plaintiff's witness, and in permitting said witness to answer said question, and to testify upon the subject matter thereof. The question is as follows:

"Then state how those are properly fastened to the car?"

Exception, p. 48.

XVII.

The court erred in refusing to instruct the jury as requested by the defendant in its 9th request, as follows:

9. "If the car was received from another railroad company, already loaded, the defendant had a right to presume that the car was constructed of proper material and in a proper manner, and that it had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when so received."

Record, p. 93. Exception, p. 94.

XVIII.

The court erred in refusing to instruct the jury as requested by the defendant in its 10th request, as follows:

10. "It is not negligence for a railway company, in the ordinary course of business, to receive and transport loaded cars of other roads in general use, and if the defect in the brake or its appliances was not such as could have been discovered by a reasonable external examination, and there is no evidence that the defects were known to the defendant railroad company's proper officers or employees, it was not the duty of the defendant to unload the car to determine whether there were any defects or not. As already stated, the defendant had a right to presume there were none."

Pr. Rec., p. 93. Exception, p. 94.

The following assignments are not based upon any specific exception. We have already stated to the court our position in respect to them. See statement preceding paragraphs 12, 13 and 14 under heading of points involved, *ante*, page .

XIX.

The court erred in submitting the case to the jury, because there is no evidence in the case tending to show, or from which it was competent to infer,

(*a*) That there was a defect in the brake while the car was in the yards at Fort Wayne, so patent that it should have been discovered by proper inspection.

(*b*) That the giving way of the brake resulted from any such pre-existing defect.

XX.

Under the allegations in the complaint it was error for the court to submit to the jury the question whether there was a defect in the brace. The allegations are as follows:

Complaint, paragraph one:

"Said wheel and rim of said brake broke and parted and threw plaintiff to and upon the ground and on the railroad track."

"The wheel or rim of said brake broke and separated, and by said breaking and separating threw plaintiff upon the ground."

The instructions (see page 96) were as follows:

"Passing from the rim to the brace, the testimony doubtless satisfies your mind that the brace broke, and probably that this, in a large degree, contributed to the injury, if it was not the primary and main cause of it."

"If you find there was such flaw, the necessary thing to determine will be whether or not the company knew, or ought to have known of it."

"Was the flaw such that the company knew or ought to have known through the agency of its inspectors at Fort Wayne, the Pennsylvania men; if it was, then you will have a right to hold the company responsible for it."

XXI.

The court erred in submitting to the jury the question whether there was a defect in the brace, for the reason that there is no proof in the case to support a finding that there was such a defect.

PART III.—ARGUMENT.

A statement of undisputed facts.

The following facts appear in the case and are undisputed:

1. DEFENDANT AND ITS RAILROAD.

In June, 1881, the defendant was incorporated under the laws of the States of Michigan and Indiana, and operated a line of railroad extending from Richmond, Indiana, northerly through the said states. The road passed through Fort Wayne, Rome City and Kendallville, in the State of Indiana, and Sturgis, Kalamazoo and Grand Rapids, Michigan, in the order named, proceeding north. Rome City was about thirty-eight miles north of Fort Wayne. The Pittsburgh, Fort Wayne and Chicago railroad ran westwardly from Pittsburgh through the States of Pennsylvania, Indiana and Illinois to Chicago and crossed the railroad of the defendant at Fort Wayne. That railroad was not

operated by the defendant, but by an independent corporation, viz, The Pennsylvania Company.

Printed transcript, pages 22, 23, q. 9–17.
page 90, q. 32, 33.

2. The Plaintiff and his Occupation.

In June, 1881, the plaintiff, Osmun Liles, was twenty-one years of age. He was in the employ of defendant in the capacity of brakeman upon freight trains, and worked upon such trains running between Fort Wayne and Grand Rapids. He had been employed in that service beginning in the preceding February.

Printed transcript, p. 22, questions 1–8.

3. The Train and Trip on June 27, 1881.

On the day named the plaintiff was brakeman upon a freight train on defendant's road going from Fort Wayne to Grand Rapids. The train consisted of about 26 cars, flat cars and box cars, drawn by a locomotive engine. The rear car was one described as a "caboose". The train left yards at Fort Wayne about ten minutes after seven o'clock in the evening, while it was yet daylight, and arrived at Rome City about ten or eleven o'clock the same night. Plaintiff was working upon that train as rear brakeman. The crew consisted of five men, engineer, fireman, conductor and two brakemen. The train was made up at Fort Wayne about seven o'clock the same evening by the men named, including plaintiff.

Pr. Trans., pp. 23, 24, q. 18–36.
" " 30, q. 126, 134–136.
" " 32, q. 153.
" " 33, q. 169, 176–178.
" " 60–61, q. 4, 5, 6, 8.
" " 77, q. 102, 103.
" " 88, 89, q. 5, 11–14.

4. The stop at Rome City.

Rome City was a regular stopping point. The trains always stopped

there, and a stop was made as usual by the train in question on that evening.

Pr. trans., page 24, q. 39.
" 39, q. 268.

5. THE INJURY TO PLAINTIFF.

As the train moved into Rome City, and while it was in motion, the plaintiff was engaged in setting brakes upon some of the cars. While setting an end brake attached to one of the cars "it gave way" and let him fall between the cars onto the ground. A wheel passed over his left foot or ankle and crushed it.

Pr. trans., page 24, q. 37, 38, 39.
" 25, q. 52, 53, 54.
" 39, q. 267.

6. WHAT CAUSED PLAINTIFF TO FALL.

The plaintiff was alone when he fell, and is of course the only one who could tell why he fell. His statements are as follows:

"I climbed down between the cars to set our end brake, and while "setting it it gave way and let me fall between the cars."

Pr. Trans., p. 24, answer to q. 39.

Q. Now explain to the jury what occurred on the night of the 27th of June, when you attempted to set the brake—the end brake on the car that you have just spoken about?
A. This thing (indicating) gave way and let me fall.
Q. Explain to the jury what gave way.
A. This rigging here (indicating) I suppose it was. I had hold of this (indicating).
Q. You had hold of what?
A. This wheel (indicating).
Q. Do you know how much of it gave way?
A. No, I do not; I did not examine it.

Pr. Trans., p. 25, q. 48–51.

Q. Now, just tell the jury what caused you to fall down between the cars.
A. By the brake giving way.

Pr. Trans., p. 27, q. 88.

Q. What part of the brake gave way?
A. I cannot tell you. I know it came off and sufficient to let me fall. I could not see what it was.

Pr. Trans., p. 38, q. 260.

7. THE BRAKE WHICH GAVE WAY,

was what is described by the plaintiff and other witnesses as an end brake.

The construction and mechanism of this kind of brake appears from the evidence to be as follows: The brakes proper do not seem to differ from those in common use upon such trains.

(They consist of two blocks, suspended below the floor of the car, on opposite sides, on a line with the wheels. A rod passes from one to the other. When drawn and pressed tightly against the wheels they cause it to stop.)

It is the apparatus by which the brakes are applied to the wheels, which distinguishes this as an end brake.

This apparatus consists of

1. An iron chain.
2. An iron shaft about 1½ feet long.
3. An iron wheel.

The shaft is run through the end of the box of the car horizontally, so as to project on the outside about ten inches. The chain is fastened to the shaft, in the part outside of the car, and passes downward through a platform, below which it is adjusted upon a pulley and passes under the car and is connected with the rod which connects the brakes.

The turning of the shaft caused the chain to wind around it, and draw upwards. That tightening of the chain drew the brakes against the wheels in the manner necessary to aid in stopping the car.

The wheel was fastened to the outer end of the shaft, to afford a lever wherewith to turn the shaft, so as to draw up and tighten the chain.

In entering the car the shaft passed through the end wall of the car and a post placed on the inside.

Other appliances connected with this apparatus were:

1. A key or bolt which was run through the shaft inside the car to prevent it from pulling out. A washer might be placed on the shaft

between this key and the wooden post to keep the key as it turned with the shaft, from wearing the wood.

2. A ratchet and ratchet wheel, the former fastened to the end of the car outside by a bolt passing through its center, the wheel so placed that the ratchet would fit into the cogs, and when so placed hold the shaft in position and prevent it from turning back when chain was drawn up tight.

3. A iron arm about one foot in length, one end of which was fastened to the end of the car about six inches above the shaft. This arm was curved. It projected outward about eight inches and downward a short distance below the shaft. In the lower end was a hole through which the shaft passed. The wheel was fastened to the shaft outside of this arm.

To operate this brake the brakemen would stand upon a platform projecting at the end of the car, on a level with its floor. This is the platform through which the chain passed.

Pr. Trans., pages 24, 25, q. 40–47.
" " 27, q. 80.
" " 38, q. 258.
" " 45, q. 354–358.
" " 46–51, Testimony of Mr. Marks.
" " 61, q. 13, 14.
" " 64, q. 43, 45–48, 52–55.
" " 74, q. 37.
" " 76, q. 59–61, 67–72.
" " 77, q. 74–76.
" " 82, q. 16–20.
" " 84, q. 32–34.

8. THE CAR TO WHICH THE BRAKE WAS ATTACHED

was a Union Line car. Was not made by defendant in whole or part, was not owned by the defendant, but was owned by the Union Line Company or by the Pennsylvania Company. These cars were used

on that line. It does not appear that it had ever been upon defendant's road before the time in question.

Pr. trans., page 27, q. 83, 84.
" " " 30, " 124, 125.
" " " 63, " 26.
" " " 66, " 79, 80.
" " " 81, " 12–14.
" " " 84, " 35, 36.

At the time in question it was loaded and locked and sealed and in transit from New York City to Kalamazoo, Michigan; was billed from the former to the latter point. In reaching defendant's road at Fort Wayne, and coming immediately to Fort Wayne, it passed over the Pittsburgh, Fort Wayne and Chicago railroad, which was then operated by the Pennsylvania Company.

Pr. trans., page 90, q. 29–33.

A seal was described by a witness as follows: (Mr. Wright's testimony, pages 78, 79, q. 97, 98, 99.) "A wire passed through the lock "or clasp after the car doors are fastened, and a metal bulb is fastened "over this wire and pressed together with a stamp with the initials and "date on it on each side of this seal. This seal was put on the lock "of the door on the car. When the door was locked and the seals on "there was no method of getting into the car without breaking the seal "and unlocking the door."

The train was started from the new yard or East yards at Fort Wayne.

Pr. Trans., p. 60, q. 4.

That yard was about one mile east of the depot at Fort Wayne, on the line of the Pittsburg, Fort Wayne and Chicago Railroad.

Pr. Trans., p. 31, q. 137–145.
" " 35, q. 199.

Plaintiff testified that they got the train out of that yard, and made up the train there.

Pr. Trans., p. 31, q. 144, 145, 146.

It appears that the car was hauled from the East to that yard by the Pittsburg, Fort Wayne and Chicago Railroad Company.

It does not appear at what time it arrived at the yard, nor how long it remained there.

It does appear that it was taken away as part of the train in question about ten minutes after seven o'clock, on June 27.

The following is all of the testimony on the subject of the making up of the train, the handling of this car and putting it into the train.

Testimony of Mr. Liles.

Q. Where was this train made up?
A. At Ft. Wayne.
Q. Who helped make the train up?
A. I and Mr. Westler, and the engineer and fireman and Mr. Hayes; we were all interested in it.
Q. What time in the day was the train made up?
A. About 7 o'clock, I think; our time to leave was 7:10.
Q. Morning or evening?
A. Evening.
Q. What time did you leave Ft. Wayne?
A. Well, I suppose it would be about 7 o'clock or somewheres along there.

(Printed transcript page 23–24, q. 26–30.)

Q. You helped make up the train at Ft. Wayne?
A. Yes, sir.
Q. Do you recollect of putting this car into the train?
A. I do not, no more than any of the rest of the cars.

(Page 30, q. 126–127.)

Q. The yard where you made up the train was a mile east from the station?
A. Yes, sir; I am counting Adams from the depot.
Q. Do you say that you don't know that those yards used there were the Pennsylvania Company's yards?
A. I don't know how they are connected nor who owns the yard. We got our train out of that yard.
Q. You and the other brakeman and the conductor made up the train, did you?
A. Yes, sir; I think the conductor was there sometimes; he did not go in the yard, he went to the office.
Q. Now, how were trains made up; was there a switch engine, or did you use the engine that hauled your train?
A. We used the engine that hauled our train.
Q. This car was where you found it in the yard?
A. Well, there was no switching done that night; I think the

train was together and I think it was about the fourth car from the end—this car—I think it was about the third or fourth car or somewhere along there; I cannot say exactly.

Q. How long did it take you to make up your train that night?

A. I do not think it took very long; I don't think there was any shifting to do.

Q. Give us an idea how long it took.

A. I cannot tell how long—ten minutes; it may have been longer or it may have been less.

Q. Do I understand that the train was all ready and the cars were already standing upon the side track in line, so that all there was to do was just to couple them together and hitch your engine to them and pull out?

A. That night I do not believe there was any switching; I think that was all; I do not think there was anything else done.

Q. Now, whereabouts in this train was this car?

A. It was at the rear end of the train.

O. How far from the caboose; the caboose was on the rear end?

A. Yes, sir.

Q. How far was it from the caboose?

A. It must have been the third or fourth car from the caboose.

Q. At which end of the car was this brake that gave way?

A. At the end next to the caboose—the end toward the caboose; it was not next to it.

Q. Do you recollect whether these cars were coupled together, or did you couple them after you went down there to make up your train?

A. There was some coupled. We had some coupling to make, I know.

Q. Do you know whether this car was coupled onto the forward or rear end of it, or whether you coupled it there?

A. I cannot say.

Q. What kind of a car was there immediately in the rear of it towards the caboose?

A. A box car.

Q. Was there any flat cars between that car and the caboose?

A. I think not.

Q. They were all box cars?

A. I think they were. The first car might have been a flat car, but I am pretty positive it was a box car.

Q. Were there brakes on these cars between that car and the caboose?

A. Yes, sir.

Q. What kind of brakes were on those cars?

A. They were uprights and side brakes, too.

Q. By a side brake you mean one like this?

A. Yes, sir.

Q. Did each one of those cars have two brakes—one at each end?

A. Well, I think not; I know there was one opposite the one that I got hurt on, for I recollect of setting it up.

Q. Do I understand that each one of the cars had one brake at least upon it?

A. Yes, sir.

Q. But whether they all had two brakes or not you do not recollect?

A. No, I do not.

Q. Well, this particular car upon which this brake was; were there two brakes upon that car?

A. Yes, sir.

Q. Is there on the model that you have before you?

A. Yes, sir.

Q. Your leaving time from the depot was seven o'clock and ten minutes?

A. I think from the yards or about that, I will not say positively. It was about seven o'clock.

Q. What time did you go down to the yard to get your train?

A. I generally went down pretty early; I went with the engine that went down and hooked onto our train, and when our leaving time came we pulled out, sometimes not until after it.

Q. When you speak about "early" do you mean a half hour or an hour before you left?

A. I have been there two hours before we left.

Q. I am speaking about this particular night.

A. I know I was down there and had changed my clothes and went up to the engine. After the train came I know the conductor came and told me what tracks to go on, but I don't recollect any more.

Q. Tell the jury, according to your best recollection, how long it was before the train started out that you went down there.

A. I cannot say. I do not recollect. I have nó recollection about that.

Q. Would you say an hour?

A. Oh, it was not an hour, I know.

Q. Would you say a half hour?

A. I don't believe it was that long. I don't believe it was over twenty minutes.

Q. You were the rear brakeman, I understand?

A. Yes, sir.

Q. When the train started out, on what part of the train were you?

A. I was standing on the rear end of the train on the top of the car.

Q. On the caboose?

A. No, sir; on the car next to the caboose. It was along towards the caboose some place.

Q. This was the 27th of June, was it?

A. I think it was, yes, sir.

Q. Was it a cloudy or clear day?

A. It was in the evening. I don't think it was moonlight. It was cleverly dark, I know.

Q. At that time of the year, on the 27th of June, at seven o'clock or half past six, the sun would not have set?

A. No, sir.

Q. Was the sun set when you went down there?

A. No, sir; the sun was up when I went to the yard.

Q. Then it was sufficiently light to see the cars?

A. Yes, sir.

Q. You could see the trains?

A. Yes, sir; we made the train up without a lantern.

Q. How long was it that evening before it got so dark that you could not see well; how far had you got on the road?

A. I don't recollect that at all.

Q. If you left at 7:10 you must have got out by Huntertown by the time it was dark?

A. I don't recollect.

Q. I understood you to say in your direct examination that you were in the habit of examining the brakes to see whether the chains were right and the brakes were right; did you do it that evening?

A. When I took hold of a brake I noticed to see whether there was a chain on it or not.

Q. Did you do that that evening?

A. Yes, sir.

Q. Did you look at the brake?

A. Before I set it I looked to see if there was a chain on it.

Q. Did you look at it before the train started?

A. No, sir.

Q. Did you look at any of the brakes to see whether they were in a condition to put on a train?

A. No, sir, I just glanced along to see if there was a chain on them, and if there was too much slack I took up the slack.

Q. Then I understand you that you made no effort to discover whether the brakes were out of order, except simply to notice whether the chain was on or not?

A. That was all.

Q. If there was any flaw in any brake here (indicating), you did not look to see whether there was or not?

A. No, sir.

(Pages 31 to 34, q. 144–193).

Testimony of Mr. Westler.

(This witness was the other brakeman on the train).

(Page 60).

Q. When was this car taken into the train and where was it put out on that night or day?

A. It was taken in at the yard in Ft. Wayne, and I think it was set off at Kalamazoo.

(Page 63, q. 27).

Testimony of Mr. Hayes.

(This witness was conductor of the train).

(Page 88).

Q. Did you go down there while the train was coming up, and start with it from that place?

A. Yes, sir ; I did.

Q. Was the plaintiff there?

A. Yes, sir.

Q. About what time did you go down?

A. I don't remember exactly that day, but usually about 30 minutes before leaving time.

Q. Then some time about half past six?

A. Yes, or 6:40.

Q. Do you recollect what kind of a day it was, whether it was clear or not?

A. Yes, sir ; it was a clear day.

Q. State whether it was daylight or not when you started?

A. It was daylight.

(Page 89, q. 7–12).

Q. Do you know how many cars in front of the caboose this car was?

A. It was the third car from the caboose.

(Page 90, q. 24).

B—Evidence as to Provisions Made by Defendant for Inspection of Cars at Fort Wayne.

1. *Arrangement with Pennsylvania Company.*

Testimony of Mr. O'Rourke.

Q. Have you got any inspectors for your cars?

A. Yes, sir ; at different places.

Q. Where are they located?

A. Some at Richmond, Kalamazoo, and at various points.

Q. At Fort Wayne?

A. We pay the Pennsylvania Company for the inspection of our cars at Fort Wayne ; we pay the Company and they employ the inspectors.

P. 85, q, 53–55.

Testimony of Mr. Wright. (Called by Plaintiff.)

Re-direct examination by Gen. Kennedy :

Q. Do you know who the inspector employed by the company in the yards at Fort Wayne is—his name?

A. I do not know ; I do not know the name of any of them. There are a number of them, but I do not know the names of any.

Q. How many inspectors are there in the employ of the company?

A. Possibly seven or eight.

Q. What are their duties?

A. Their duty is to examine trains to see their condition—the cars, boxes, axles, wheels, crowbars, etc.

Q. Everything connected with the car?

A. Well, I could not tell to what extent. I know I have seen them examining the rolling part of the car.

Re-cross examination by Mr. Chapin:

Q. You say there were inspectors there for the company; were they good, competent men for their business?

A. They have been there for some time; that is all I know.

Q. I will ask you, so far as you know, whether they were men that were competent for their business, and careful men?

A. They were, so far as I know.

Q. Were the cars of the Grand Rapids and Indiana Railroad Company inspected by these men?

A. All cars that came into that yard were inspected by these men.

Q. I will ask you whether the Grand Rapids and Indiana Railroad Company use the same yard that the Pennsylvania Company does?

A. The Pittsburgh Company?

Q. Yes, the Pennsylvania Railroad Company; it is called the Pittsburgh, Fort Wayne and Chicago Railway Company.

A. Yes, sir.

Q. The same yards were used?

A. Yes, sir.

Q. And the inspectors were the inspectors that both roads used?

A. Yes, sir.

Q. Do you personally know whether this train of cars was inspected that night before it started out?

A. I do not, personally.

Q. That is, you did not see it inspected?

A. No, sir; I did not see it inspected.

Q. Was it not the habit and usage of the company to receive loaded cars from the Pittsburgh, Fort Wayne and Chicago Railway Company and forward them on its road to their destination?

A. Yes, sir.

(P. 77–8, q. 79–92).

2. Duties of Brakemen.

Testimony of Mr. O'Rourke.

Q. On your road at the time this plaintiff was at work there what was the duty of the brakeman, as to seeing whether brakes were in order or not, and reporting when they were not in order?

A. Different roads have different rules. Do you want me to testify as to the duties of a brakeman?

Q. Yes.

The Court:

Q. Have you any written or printed rules?

A. Yes, sir; and outside of them we have a traditionary rule, as to the duties of the men, that all railroad men are supposed to understand.

By the same:

Q. In other words, you mean that all of the rules are not in print?

A. No, sir; not all the details. There are only certain rules as to very important matters, but to the general routine duties of the men they have to learn. One learns it from another, and they become accustomed to it in the transaction of their business.

By Mr. Chapin:

Q. State what the duties of a brakeman were, as to examining brakes and reporting when they were out of order. (Objected to.)

Q. Are your rules written or merely practice?

A. We have some written rules on the subject, and some are not.

By the Court. So far as they were written it can be proved, and so far as it was practice, you may state in regard to that.

The Witness. The duties of railroad train hands, conductor and brakemen, there is no difference as to their duties; it is a portion of their duties to pay attention to—

By the court:

Q. The question is whether there were written rules or not?

A. There was no written rule at that time. The duty of trainmen is to look after the condition of their train in all respects, and if they find anything wrong with the wheel, with the brake, with the frog, with the track, with the oilbox, or any part of the car which can be brought plainly in view, and which a man can plainly see, his duty is to either fix it or notify the conductor. Well, if it is a brakeman, to find it out and call some one's attention to the fact that a brakejoint is broken, that an oilbox is out of repair, or there is a hot journal, or that the brakewheel is out of order, or that there is anything the matter with the car.

(P. 83–4, q. 25–31.)

Cross examination.

Q. You say the duties of the brakemen and trainmen are to generally look after the train, track, etc.?

A. To look after the property of the company, their own safety, the property of those in transit over the road, etc.

Q. To the best of their skill?

A. Yes, sir.

Q. Since this accident occurred you have printed rules for your company?

A. Yes, sir.

Q. And you have put this in particularly as one of the rules they must observe?

A. Yes, sir.

Q. Before that you had no written rule in regard to that?

A. Before that we had no written rule on that subject, and that is an extra precaution. When the railroad was first started we did not

have half the rules we have to-day, and that very rule was added not any more for the interest of the company than for the protection of the employees.

Q. Is it not a fact that on account of this case you made that particular rule and printed it in 1883?

A. No; if we had done it on account of this particular case we should have done it immediately. It arose in that way. We found some of the employes were inclined to say that they did not think it was their duty; in other words, they did not have sense enough, and we had to put it down, and we printed the rule so as to call especial attention to it.

Q. Do you mean to say that the men you employ have not sense enough to attend to their business?

A. I did not say that. The same would apply to railroad employes as to others.

Q. Don't you, as a rule, try to employ the most sensible men?

A. Yes, sir; we are like all others. We all have some regulation and pay the same amount of salary, and as a matter of course, seek out for the best men.

P. 87–8, q. 84–90.

Testimony of Mr. Wright. (Called on behalf of defendant.)

Q. State what were the duties of trainmen—of brakemen—upon those freight trains in regard to examining brakes?

A. Their duties were these: It was always understood that the duty of the brakeman was to look over the train to see that the couplings were properly made, and see that such brakes as they would be likely to use were in proper condition, both for use and safety.

Cross-examination by Mr. Kennedy.

Q. Such brakes as they would be likely to use.

A. Yes, sir; that they were likely to use.

Q. Not to examine the whole train?

A. It was not generally done; it was not understood that they had to examine every brake on the train, but such brakes that in all probability they would be likely to use.

Q. Where a train is going down hill very rapidly and down grade, they sometimes use some brakes then they don't anticipate?

A. Yes, sir.

Q. Then, if an extra brake was called for, that would be outside the brakes that they would be in the habit of using ordinarily with the train?

A. I can only speak from my own judgment in regard to such things. Knowing the road as I do, I should make an allowance—

Q. (Interrupting.) You are simply speaking from your own judgment?

A. I should make an allowance for all grades and stops.

Q. You are not speaking from any rules?

A. No.

Q. But your own experience?

A. Yes, sir.
Q. And from your knowledge of the road?
A. Yes, sir.
By Mr. Chapin:
Q. In using the brakes what brake would the rear brakeman generally use?
A. He would use the brake that was handiest to get at from the caboose. He works from the caboose forward as many brakes that he would discover from the speed of the train would be required to hold it, and the length of time and distance he would have to stop it.

(P. 91, q. 1–10.)

Testimony of Mr. Westler.

Q. Are you in the habit of examining the brakes on the train other than the ones on that end or part of which you have supervision?
A. Yes, sir; it is my business to examine all the brakes on both ends of the train, enough to hold the train; the rules require the brakeman to do that before the train leave the yard.

P. 64, q. 42.

Testimony of Mr. Liles.

Q. You could have examined that brake that night, if you had felt disposed to, before the train went out?
The Witness. I never was instructed to examine them by anybody.
Q. Did you have a copy of the rules and regulations of the company—a printed copy?
A. Yes, sir.
Q. Do you remember that you examined the rules?
A. Why, I have looked over them.
Q. I will ask you if you were not aware of its being a rule that it was the duty of brakemen to examine the brakes on their trains, and see that they were in safe and proper condition for use?
A. Well, I do not mind much about it, but I never was cautioned by any of our conductors or anybody to examine them. I knew that if we saw a brake out of order we generally repaired it.

P. 40, q. 279–282.

Q. Now, don't you know it was the standing rule of the company for brakemen to exercise particular care? Was it not understood by the brakemen themselves that they must exercise particular care in using the brakes?
A. To keep your train under control and so on.
Q. I mean in the use of the brake itself?
A. I don't recollect of ever seeing such a rule.

(Page 41, q. 292–293.)

Q. I will ask you if you didn't know, and if you didn't understand that it was your duty for your own self-protection to see that those brakes were in proper order?

A. I did not consider it my duty; if I had seen anything wrong with the brake, I, of course, was to fix it or keep away from it.

(Page 42, q. 298.)

Q. For your own self-protection you were to look?

A. No; I never done that particularly; I always looked out for my train; I always thought about the train; I aimed to keep the train under control; if I saw anything wrong about a brake, of course, I would look if I was going past it.

Q. You took no pains to do it?

A. No, sir; I did not think it was my duty to do it.

Q. And even your sense of self-protection didn't tell you it was your duty to do it?

A. I didn't make any examination of the brakes to see if they were very strong or anything.

(Page 42, q. 299–301.)

C.—DISCUSSION OF POINTS INVOLVED.

I.

The defendant having made adequate provision for an inspection of cars at Fort Wayne, discharged its full duty and cannot be held liable for the negligence of the appointed inspectors, for failure (1) to make any inspection, (2) to make a proper inspection. The question of fact involved in the proposition is fully established by the evidence.

As to the law the case is distinguished from that of Northern Pacific Railroad Company vs. Herbert, 116 U. S. Rep., 642, by the fact that the car in this case belonged to another company, and came to defendant as a connecting line loaded and in transit.

The duty of the defendant as to such cars is only to provide for a competent inspection.

Mackin vs. B. & A. R. R. Co., 135 Mass., 201. (15 Am. & Eng. R. R. Cases, 196.)

Smith vs. Potter, Receiver, 46 Mich., 258.

C. & X. R. R. vs. Webb, 12 Ohio St., 475.

L. M. R. R. vs. Fitzpatrick, 42 Ohio St., 318. (17 Am. & Eng. R. R. Cases, 575.)

If our proposition is sound the court erred,

1. In refusing to instruct the jury as requested in the 11th request.

2. In sustaining plaintiff's demurrer to the 2d and 3d paragraphs of defendant's answer.

Assignments of error, Nos. 1 and 2.

II.

It is established by the evidence, and the court should have held as a matter of law, that the plaintiff himself was charged as fully as anyone with the duty of making an inspection of the brakes, (1) as a duty imposed on him under the circumstances by the law; (2) a duty imposed by the express rules of the company.

He is chargeable with the negligence, if any there was, with respect to an inspection of the brake in question and cannot recover.

This point is to be determined by the evidence,

1. Relating to the circumstances of the employment and work to be performed by plaintiff.

2. Relating to the duties of brakemen under the rules of the defendant.

3. Relating to the examination made.

If this proposition is sound, it follows that the court erred in refusing to instruct the jury as requested by the defendant in the 14th and 15th requests.

Assignments of error VII. and VIII.

The evidence on the first two points appears elsewhere.

As to an examination of the car and brake in question before the injury the following is the testimony:

Testimony of Mr. Liles.

Q. What examination did you make, if any, of the cars and brakes and equipments, and so forth, at the time of making up the train, or afterwards?

A. All I done was to see that the cars were coupled together, and that the pins were all down, and such like as that, and the drawbars.

P. 24, q. 31.

Q. What knowledge, if any, had you of the condition of this brake, or of any defects in this brake at the time?

A. I did not have any. I was in the habit, when I was setting these end brakes—I never liked to use them very well, but when I set

them I generally looked pretty close to see if there were chains on them, and everything that way.

Q. Had this brake a chain on?

A. Yes, sir.

P. 27, q. 79–80.

Q. I understood you to say in your direct examination that you were in the habit of examining the brakes to see whether the chains were right and the brakes were right; did you do it that evening?

A. When I took hold of a brake I noticed to see whether there was a chain on it or not.

Q. Did you do that that evening?

A. Yes, sir.

Q. Did you look at the brake?

A. Before I set it I looked to see if there was a chain on it.

Q. Did you look at it before the train started?

A. No, sir.

Q. Did you look at any of the brakes to see whether they were in a condition to put on a train?

A. No, sir; I just glanced along to see if there was a chain on them, and if there was too much slack I took up the slack.

Q. Then I understand you that you made no effort to discover whether the brakes were out of order, except simply to notice whether the chain was on or not?

A. That was all.

Q. If there was any flaw in any brake here (indicating), you did not look to see whether there was or not?

A. No, sir.

P. 34, q. 187–193.

Q. So you made no examination at all to see whether it was or not, to see whether the brakes were in order, except simply to look at the chains?

A. That was all; when I take hold of a brake to set it I kind of pull on it steady to see whether it was fastened.

P. 34, q. 198.

Q. Did you set the brake on the first car?

A. Yes, sir; and the next brake was an upright brake, and the next brake was a side brake. I set it and then went to this brake. The next to the last brake I set was of that species.

Q. Then you went to this brake?

A. Yes, sir.

Q. Did you have your lantern with you?

A. Yes, sir.

Q. Did you have it when you went to set the brakes?

A. Yes, sir.

Q. Did you look at the brake to see whether it was in order before you applied it?

A. I just looked to see whether the chain was on it, and kind of eased up on it when I started to turn it.

Q. It was dark at that time, I suppose?

A. Yes, sir; it was about ten or eleven o'clock.

Q. In using your lantern to determine whether the chain was on the brake or not, you had to hold it down, didn't you, and take a side look at it this way (illustrating) to see?

A. No, sir.

Q. How did you look?

A. I catched hold and kind of tightened her up.

Q. You just tried it by the wheel?

A. Yes, sir; I felt it like this way (illustrating) with my hand felt the chain.

Q. Then you did not look; you merely did it by feeling?

A. I didn't take the lantern to see; I could see of course, by the light, though.

Q. Which side of the brake were you standing on?

A. I was standing on the inside of it a little, very near straight with it.

(Page 37, q. 238–248).

Q. These Union cars that you speak of, they were frequently used on that line, were they not?

A. Yes, sir.

Q. Did you ever attempt to examine the brakes to see how they were constructed?

A. No, sir.

Q. You have plenty of time to do it, to examine the brakes?

A. Yes, sir; but I did not think it was my duty.

(Page 39, 40, q. 276–278).

Q. Then was it not your habit to examine and see what the condition of the brakes was, and to see whether the brakes were in order or not?

A. Well, I examined them so far as I knew. I was always careful about setting a brake, but the particular safety about it was to see whether the chain was in good order.

Q. Not the chain, because if the chain was out of order that would simply be that you could not brake, because the chain was lost; but how was it about the apparatus of the brake itself—the wheel and arm?

A. I have never examined them any more than to take hold easy, that way (illustrating).

Q. You testify that you did not examine the brake itself, the wheel and arm, to see whether it was in good order, and to see whether the bolts were in?

A. No, sir, I never examined only what I have said. I have taken hold kind of easy, in starting them, to see whether there was anything wrong with them or not. I never took a lantern and went to see if the bolts were out, or anything of that kind.

Q. If it was day time, how did you do?

A. If we had to stop I set up the brakes.

P. 41, q. 288–291.

Q. I will ask you if you didn't know and if you didn't understand

that it was your duty for your own self-protection to see that those brakes were in proper order?

A. I did not consider it my duty; if I had seen anything wrong with the brake I, of course, was to fix it or keep away from it.

Q. For your own self-protection you were to look?

A. No, I never done that particularly; I always looked out for my train; I always thought about the train; I aimed to keep the train under control; if I saw anything wrong about a brake, of course I would look if I was going past it.

Q. You took no pains to do it?

A. No, sir, I did not think it was my duty to do it?

Q. And even your sense of self-protection didn't tell you it was your duty to do it?

A. I didn't make any examination of the brakes to see if they were very strong or anything.

P. 42, q. 298–301.

Q. Now, in making up a train and in going out with a train, what does the brakeman do with regard to brakes along the train? What sort of inspection do you give for the purpose of finding out the condition of the brakes, such as to use and such as not to use?

A. Our inspection generally comes by the use of them.

Q. How often had you used the brakes that night along on that train?

A. Oh, I can't tell you how often we had used them. We had stopped several times.

Q. What inspection does the brakeman make, if any, for the purpose of finding out what brakes are fit to use and what are not fit to use?

A. Why, in the yard, in going out, I generally examined the chain to see whether there was any slack in it.

Q. Did you examine any other part of the brake, the wheel or anything?

A. No, sir.

P. 46, q. 359–362.

Testimony of Mr. Westler.

Q. How do you know that he was setting up brakes other than the end brake that is alleged to have broke, when there was eight to twelve cars between you and him?

A. Because there was some poor brakes between him and me, and rather than go so far he had rather set the end brake and save time by doing so.

Q. You may state whether or not you examined all the brakes on that train that night.

A. No, sir, I did not.

Q. How do you know, then, there were poor brakes on Lile's part of the train?

A. Because I always examine enough brakes to hold the train. I thought he had some poor brakes.

Q. Are you in the habit of examining the brakes on the train other than the ones on that end or part of which you have supervision?

A. Yes, sir, it is my business to examine all the brakes on both ends of the train, enough to hold the train; the rules require the brakeman to do that before the train leaves the yard.

Q. What do you mean by the half circle of cast iron with a hole in the center of it that the brake shaft passes through?

A. It is a brace to support the brake.

Q. In what condition was this casting?

A. This brace was all right; it was good.

P. 64, q. 39–44.

Q. Whereabouts was this place in the casting?

A. In the shaft.

Q. On that part on the inside or the outside of the car?

A. On the outside.

Q. How was it, then, that you did not observe this flaw when you examined the brakes?

A. Because I did not get down in between the cars to examine it, and supposed the other brakes on top the car were good until I got to them.

Q. Then you did not examine this end brake thoroughly, did you?

A. Did not examine it until after he was hurt.

Q. Then you did not observe your custom closely on that day in the examination of the brakes?

A. I knew he had two or three good brakes behind, and I had two or three ahead, and I knew that was enough to hold the train. I examined until I had enough to hold the train.

P. 65, q. 59–63.

III.

If the duty to inspect rested upon the other persons, and not upon the plaintiff, the plaintiff cannot recover on account of the negligence of such persons, because they were fellow servants of the plaintiff in the sense that precludes a recovery by him on account of their negligence.

We refer in support of this proposition to the authorities cited in support of the first proposition, *ante*.

If this proposition is sound the court erred,

(*a*) In refusing to instruct the jury as requested by defendant in the 11th request.

Assignment of error I.

(*b*) Refusing to instruct the jury as requested by defendant in the 12th request.

Assignment of error IV.

(*c*) In refusing to instruct the jury as requested by defendant in the 7th request.

Assignment of error III.

(*d*) In instructing the jury that the defendant is liable for the negligence of the inspectors, as was done in that part of the instruction given which are set forth in the

Assignments of error V. and VI.

(*e*) In sustaining plaintiff's demurrer to the answer, par. 3.

Assignment of error II.

IV.

It was incumbent upon the plaintiff to make out his case by preponderance of evidence, and the jury should have been so instructed, according to the second request. Instead of giving the request the court instructed the jury that the burden was upon plaintiff to establish certain facts. We submit to the court the question whether the defendant was not entitled to the instruction as strongly as stated in the second request.

(9th assignment of error).

V.

The 10th assignment of error raises the question whether it was competent to receive the depositions of Mason and others against the objection of the defendant, without proof of the official character of the party before whom they were taken.

(10th assignment of error).

VI.

The testimony in the answer of Mason, that a good many were there looking at the wheel (in the evening after the accident) and that they were all talking about the wheel and the flaw in it, was incompetent and the court erred in refusing to strike out that testimony and in permitting it to go to the jury.

(11th assignment of error).

VII.

It was incompetent for the witness Rhinehart to testify that he and Mr. O'Rourke, superintendent, were out there (at the scene of the accident after it occurred) and that he and the superintendent examined the wheel at the same time; that "we looked at the wheel, and I spoke and said there was a flaw in the wheel. He picked it up and looked at it, and he said, 'I don't see any flaw in it.' I showed him, and said to him what I thought was a flaw by the looks of it."

The court erred in refusing to strike that testimony from the deposition, and in permitting it to go to the jury.

(12th assignment of error.)

VIII.

It was also incompetent for the witness Rhinehart to testify that he said at the time of said examination, viz: "What I claimed, the flaw was an old crack with a dead look, while the balance of the brake was new and bright."

The court erred in refusing to strike that testimony out of the deposition, and permitting it to go to the jury.

(13th assignment of error.)

IX.

It was incompetent for the witness, George W. Moore, to testify as to whether or not he made an examination of the broken wheel, to determine whether or not the same had been whole and perfect before the accident, and to testify as to what indication he observed of its dangerous condition previous to its breakage, the night before. The witness was not an expert, and did not see the wheel until the next day, and did not identify it as the wheel which broke.

The court erred in refusing to strike this testimony from the deposition, and in permitting it to go to the jury.

(Fourteenth assignment of error.)

Chicago vs. Greer, 9 Wallace, 726.

X.

The testimony which the witness Marks was permitted to give at the

trial, against defendant's objections, as to the proper construction of said brakes and the defective construction of the one in question was clearly incompetent, and the court erred in permitting it to go to the jury. The defendant in this case could not be held responsible for anything pertaining to the character of the implement or its construction.

(Assignments of error 15 and 16.)

XI.

We submit, as matter of law, that the defendant was not bound to open and unload this car when they received it loaded and sealed, in order to make an examination, and the jury should have been so instructed, in accordance with the 9th and 10th requests. It was error for the court to refuse those requests, and to leave to the jury the question whether the defendant should have unloaded and examined the car or not.

(Assignments of error, 17, 18.)

XII.

There is no evidence in the record to support the allegation that there was a defect in the brake when the car was in the yard at Fort Wayne of such a character that it would have been discovered by a proper inspection.

There is no testimony in the case of any person who saw the brake *before* the accident.

The only evidence that could be referred to, to support the allegation, consists of

1. The fact that the brake gave way.

2. Testimony of persons who examined some parts of the brake *after* the accident.

This testimony is as follows:

1. *Mr. Liles.* Did not see it.

   Page 25, q. 51.

2. *Mr. Hayes* (Conductor). Did not see it.

   Page 90, q. 20–21.

David L. Mason. (Deposition, p. 52, Pr. Rec.)

Q. You may state what you know, if anything, of the breakage or giving away of any car or part of car on the freight train on the Grand Rapids and Indiana Railroad which was standing at the depot of said road at the time the plaintiff was injured and carried into the depot of said company.

A. I saw the wheel as broken into; I saw about one-third of the wheel with one spoke in it; it was the brake wheel that was off of that train, and I saw a vacant place on the train where they all said it came from. There was a rusty place in it which I would call a flaw, in the rim, about two-thirds of the way through.

Q. Please explain what you mean by the words wheel and rim, as used in your answer to the last interrogatory before this.

A. I mean the rim on the wheel that was used on the end of the brake. It was an end brake.

Q. State at what part of the car the vacant space or place was where you noticed the absence of the break head or wheel.

A. The vacant place was at the end of the car.

Q. State who, if any one, was present with you when you examined this wheel, and what light, if any, you had with which to make the examination of the said wheel or rim.

A. There were several present; Mr. Joshua Rhinehart was one, Mr. P. S. O'Rourke. I knew of a good many that were there looking at the wheel. They were all talking about the wheel and the flaw in it. There was a lantern there, and a light at the corner that gave light.

Q. State whether or not you made an examination of this brake here or wheel with reference with determining its connection as to its being sound or unsound before the accident occurred.

A. I examined it.

Q. State what indications, if any, you discovered of the unsoundness or broken condition of the wheel or brake prior to the time of the accident.

A. There was a flaw in the wheel.

Q. What indications were there, if any, of a crack or break in the rim or wheel of the brake which indicated that it had been cracked or broken some time before?

A. It was rusted in.

Q. State how far this brake or crack which you say was rusted into, extended into the wheel or rim of the wheel, of the brake.

A. About two-thirds through.

Pr. Rec., page 53.

Cross-examination.

Q. At what place did you see the piece of the broken wheel spoken of?

A. Near the depot, close to the road crossing.

Q. How far away was the car from which you were examining the portion of the wheel was—taken?

A. It did not exceed 50 feet.

Q. Who brought the broken wheel from the car to where you examined it?

A. I do not know.

Q. Did you not examine it before it was broken?

A. No; I did not see it.

Q. The flaw you speak of was simply a crack at one end of the broken part?

A. I suppose it was a crack.

Q. What is your business, Mr. Witness?

A. At that time I was selling agricultural implements.

Re-direct.

Q. State on which side of the railroad you were when you examined the broken wheel.

A. I was on the east side.

Q. State whereabouts the break in this wheel or in the rim of the brake occurred with reference to the crack and injection place at which you have spoken.

A. Separated right in the crack.

Pr. Rec., page 54.

Rhinehart. (Deposition, page 56, Pr. Rec.)

Q. State whether or not, while at the train at that time, you saw any part or parts of a broken rim or brake-wheel; and if you saw any, so state. A. I did.

Q. What examination, if any, did you make of the part or parts of the broken wheel or rim, and what was the condition of the same, with reference to its soundness or unsoundness?

A. I was out there and Mr. O'Rourke, superintendent of said road, and I examined the wheel at the same time; he had a lantern; we looked at the wheel, and I spoke and said there was a flaw in the wheel. He picked it up and looked at it and he said, "I don't see any flaw in it." I showed him and said to him what I thought was a flaw by the looks of it. The flaw seemed to strike in quite a ways.

Q. State whether the brake in this wheel occurred with reference to the flaw you have spoken of.

A. It broke through the flaw.

Q. State what examination you made, if any, of this brake or this wheel of the brake to determine its condition, as to its being cracked or otherwise?

A. I examined with reference to that, and I found what some would call a crack, but I call it a flaw.

Q. State whether this flaw or crack was on its outside or inside of the rim of the brake-wheel.

A. My recollection of it is it was from the inside out.

Q. State how far this flaw or break extended into the rim of the brake-wheel.

A. I think the point of the flaw run about half way through rim.

Q. State what, if anything, there was to indicate how far the break or flaw extended into the rim of the brake-wheel.

A. What I claimed, the flaw was an old crack with a dead look, while the balance of the brake was new and bright.

Q. State what you know, if anything, as to where this broken brake-wheel had been just before you examined it?

A. It was picked up right there by the end of the car. I knew by the appearance that it was broken off of the end of a freight car; it was broken off from a freight car in the train standing there on the track.

Q. State on which side of the railroad track you found this wheel and made this examination.

A. On the east side of the track, about twenty-five feet from the depot?

Q. State how many pieces of this broken brake-wheel you saw and examined.

A. I saw two pieces of the wheel.

Cross-examination.

Q. Is it not a fact that the flaw you spoke of was indicated solely by what seemed to be an old crack or break partially through the rim, or do you mean to say the iron of which the wheel was made was defective?

A. My candid opinion is that the crack was always there; the iron never cemented or formed a solid part.

Q. On what do you base your opinion?

A. I base my opinion on the fact that where the brake was it was smoother than the newly broken part.

Q. Of what kind of iron was the wheel made, cast or wrought?

A. In my opinion it was cast.

Q. Have you ever had any experience or do you know anything about the business of moulding, or was you ever engaged in any way in the manufacture of castings?

A. I have not.

Moore. (Deposition, p. 58, Pr. Rec.)

Q. You may state whether or not, after this injury to the plaintiff, you examined the pieces of broken brake-wheel; and if so, when and where it was.

A. I did; it was north of the Grand Rapids depot here, when I see—it was in the morning, about six o'clock, after the accident happened. It was right north of the depot, between the telegraph pole and the track on the ground.

Q. State how many pieces of the rim you saw.

A. I saw two or three.

Q. You may state whether or not you made an examination of this broken brake-wheel, to determine whether or not the same had been whole and perfect, before the happening of the accident.

A. I did.

Q. What indication, if any, did you observe of its dangerous condition previous to its breakage the night before?

A. I noticed a flaw in the rim of the wheel two-thirds of the way through the wheel.

Q. What did you observe in the appearance of this broken rim or wheel that indicated the flaw you have spoken of?

A. You could tell by the old break; it was rusted two-thirds through the wheel, while the rest was bright.

Q. You may state whether this old break or flaw was from the inside of the rim of the wheel out as from the outside in.

A. From the inside out.

Q. You may state what the fact is as to whether or not the pieces of the broken rim and brake wheel, of which you have spoken, were at and on the ground where you found them, the evening before you found them in the morning.

A. They were not there.

Cross-examination.

Q. Was there more than one of what you call flaws in the wheel?

A. I disremember, but I had an idea that there was two, but the one I distinctly remember, that was about two-thirds through. I don't remember any others.

Q. You spoke of rust in the old break, or flaw, as you call it. State, if you can, how much it was rusted; whether or not it was enough to discolor it, or whether it was eaten away by the rust or not.

A. It was discolored, but not eaten away.

Westler. (Page 60, Pr. Rec.)

Q. State what examination, if any, you made of the brake and in what condition you found it.

A. I examined the brake and found that there was a flaw in the casting, and in the way it was put into the car.

Q. State what flaw, if any, you discovered in the casting, and where, and the nature of it.

A. It was—the shaft was cracked; what I mean by the shaft was the iron that went through into the car. This shaft on the inside of the car should have had a key to go through it or a bur on the end; instead of that I could find neither, no place for a bur and I could find no key.

Q. State whether or not the shaft had a thread cut upon it for a nut.

A. No, sir; it did not.

Q. What examination, if any, did you make of the end of the car through which the shaft was driven; and, if any examination was made, in what condition did you find that?

A. I examined it the best I could. I didn't get into the car. It looked as though the shaft wasn't long enough to be fastened secure as it ought to be.

Q. Through what was the shaft driven or put into the end of the car, and in what condition was the woodwork?

A. It was put through the siding, an inch and a half or two inch studding, and the siding was broken outside; the studding—I couldn't see plain enough to see how the studding was on the inside of the car; from what I could see it looked more like a board than it did like a studding. I don't think it was split on the inside.

Q. What examination, if any, did you make of the brake, and in what condition did you find that? State fully.

A. I found the brake, the castings, all broke into pieces—into four or five pieces.

Pages 62–63.

Cross-examination.

Q. In what condition was this casting?

A. This brace was all right; it was good.

Q. Was the platform broken?

A. No, sir.

Page 64.

Q. Whereabouts was this place in the casting?

A. In the shaft.

Q. On that part on the inside or the outside of the car?

A. On the outside.

Page 65.

Q. How much of the broken shaft remained in the end of the car?

A. I didn't remember whether any of it remained in. I couldn't tell as to that.

Q. How much of the shaft was broken off?

A. I don't remember how much it was; I think about six inches.

Q. How do you know, then, that there was no bur or key on the end of the shaft on the inside?

A. I judged from the looks of the shaft.

Q. How much of the siding was broken on this car?

A. Why, there wasn't very much broken; just where the shaft went into the car.

Q. If you did not enter the car, how do you know there was only a board and not a studding on the inside?

A. I said it looked more, from what I could see, like a board.

Q. How much of this piece of timber, that you say looked like a board, could you see?

A. I couldn't see very much—perhaps half—three-quarters of an inch of it.

Q. How do you know, then, that it was not the usual studding that is put in such cars?

A. As I said before, it might have been studding, but it didn't look like it.

Q. Where did you find those four or five pieces of the brake?

A. Between Liles and the depot.

Q. When did you find them?

A. When I went up to flag the other section, probably twenty minutes; I don't know just how long I was gone.

Q. Did you first help carry Liles to the depot?

A. Yes, sir, I did.

Q. Then, when did you examine these four or five pieces of the brake?

A. When I came back from flagging the other section.

Q. Did you pick them up on your way back from flagging the other section?

A. Yes, sir, I did.

Q. What caused you to pick them up?

A. I don't know as anything particularly, only I wanted to see how they was broken.

Pages 65, 66.

Re-Direct.

Q. After picking up the pieces of broken brake were they shown to or examined by anybody, and if so, whom?

A. Yes, sir; by Charles Pierce, a brakeman on train behind us, and I think Mr. Wright, of the train behind. Several more examined, but I don't just remember who they were.

Q. State, after your examination of the shaft, whether it was broken off in the car or pulled out altogether.

A. It was out of the car altogether.

Page 67.

Wright. (Page 71.)

Q. What inspection or observation did you make as to the train that was on the track or any of the cars? Go on and state what you know about it.

A. After I had seen Liles in the depot, the use of my lantern was requested to look at the car and the condition of the car upon which it was said he had received his injury, and I went along. We looked at the different broken parts, and in this bracket here (indicating) somewhere along here—I could not recollect now just where it was—I discovered what I took to be an old flaw or an old break, what I would term or what has been represented to me as a sand flaw. It was not rusted, but had a bronzed appearance, extending possibly two-thirds of the way across, and possibly one-third of the depth. That was all that I discovered in the way of a breakage or of anything of that kind.

Q. What about the wheel; did you see that?

A. I saw the wheel—all the parts that were there.

Q. How many parts were there?

A. That I could not tell; I did not count them.

Q. About how many were there?

A. There were several, possibly two or three; there may have been four.

Q. What examination, if any, did you make as to the end of the car at which this accident occurred?

A. The examination was casual; it was up a little distance, and all the examination I would make would be simply to look up to see that part.

Q. Did you kook up?

A. Yes, sir, I looked up.

Q. What did you see?

A. I saw this iron wheel attached here; the parts that were not

broken off, the parts that remained after this part was broken off (indicating), and also the hole in the end of the car for this shaft to go in.

Q. Where were those parts of the iron that were broken off?

A. They were on the end of the car.

By the court:

Q. How many pieces were broken off?

A. I could not tell you whether one or two, but whatever was left here was on the end of the car; that is all I can recollect.

By Gen. Kennedy, resuming:

Q. I will ask you whether, upon examination, you did not find but one piece instead of two?

A. I could not say; there are some of these castings that have a web here (indicating), and these parts here (indicating), there is a web between; it may have been one of those, but I could not say.

Q. State in whose possession the wheel and shaft were at the time you examined them; who took possession of them there?

A. That I could not tell, who took possession of them; they were lying there on the ground, scattered around in a little circle.

Q. What time of night was it?

A. It was after ten o'clock somewhere; it may have been after eleven o'clock; I could not say; it was somewheres between ten o'clock and eleven o'clock at night, but I could not be exact now.

Q. When the wheel separated from the car with the chain and this part attached to it, what became of the wheel, it and the chain attached, together with the shaft?

A. It was still dragged along with the train, I suppose.

Q. Under the car?

A. It would fall down over the deadwoods and drag along.

Q. Explain to the jury what you mean by the deadwoods.

A. You have a model of the car, I believe. If that was brought here I could indicate what it is.

Q. State what examination, if any, you made as to the rim of the wheel, in regard to defects, if any.

A. I saw all the parts that were there. I did not discover any flaw in the rim of the wheel.

Pages 72, 73.

Q. Explain to the jury what pulled out of this car, and what was left as applied to the car.

A. This is the wheel and that is the casting (indicating). This part broke off here somewhere (indicating), and here is the chain passing along here (indicating), and this is the shaft (indicating). As soon as this broke (indicating), this part of the shaft-wheel and this part here (indicating), all would fall over this way and drag right over the deadwoods.

Q. What examination, if any, did you make of this particular car to see what the defect was as to that part of it?

A. I made no examination, only what I could see from the surface of the cars.

Page 74.

Cross-examination.

Q. Was the chain, when you saw the brake-wheel, attached to the shaft of the brake-wheel?

A. It is my recollection it was.

Q. And it was also attached to the brake itself when you saw it?

A. It was, I believe; that is my recollection.

Q. And you say you did not get up and examine the place where the shaft of the brake-wheel was put into the car?

A. No, I did not.

Q. Well, did you examine that portion of the arm or bracket, as it is called there, that was up on the car to see whether there was any flaw there or not?

A. No, I did not.

Q. Who was present when you made this examination, such as you did make?

A. There were my brakeman, Mr. Pierce, the superintendent of the road, and there were several others, but those are the only two that I recollect of.

Q. Did anybody, while you were there, get up upon the platform at that time, or deadwoods, as it is called, to examine the portion of the brake on the car?

A. There did, I believe.

Q. Who was that?

A. The superintendent of the road.

Q. State whether he had a lantern or not.

A. He had; he had my lantern.

Q. Did he hold it up to close where it was broken?

A. It is my recollection that it is.

Q. What did he say about the break?

Objected to by counsel for plaintiff as incompetent, irrelevant and immaterial.

The Court. Anything said on the subject is competent for either party, I think.

A. He said there was no break there, no flaw.

Q. Did he not, Mr. Wright, invite those standing around there to get up and look at it, so as to determine the question whether there was any flaw or not?

A. I believe it was so understood if not expressed. I could not say that was the expression used, but it was so understood; it was free for all to examine.

Q. It was suggested that there was a flaw in that portion of the brake, the part that was on the ground, was it not?

A. It was.

Q. And did not Mr. O'Rourke say that there was no flaw there, but that it was simply the sand and dirt that got into the fracture as it was being dragged, and to determine it he got up on the car, looked at the portion up there, and then called the attention of the men there to it, and for them to get up and see for themselves and determine the fact; was not that done?

A. The suggestion was made that there was an old flaw in it, and he looked at it, and he says, "That is nothing but some sand and dirt, gentlemen," and then he got up and made this examination on the end of the car, and, as I say, I cannot recollect what the words there. I have no definite recollection of the words he used, but I say it was understood, and it has been my understanding that it was free for all to look and see.

Q. If Mr. O'Rourke did invite anyone to get up and look at it, did anyone get up?

A. There was no one got up that I recollect of.

Q. You say that in your opinion there was an old sand flaw. Might you not have been mistaken, and that the appearance was caused by just what was suggested by Mr. O'Rourke—that is, that it was the dirt and sand that had got into it in dragging it along?

A. My impression was that it was an old sand crack.

Q. You say it was not rusted?

A. No, it was not rusted; it had a bronzed appearance. Of course there was sand there.

Q. There was dirt on the arm and some sand?

A. Yes, sir; there was some dirt and sand.

Pages 74–76.

Q. What is your impression as to where it was broke; was it broken up here (indicating), or was it broken down where it was all one piece?

A. That is a point I could not state—just where it was. It was broken near the shoulder, but whether it broke one piece or two pieces I could not recollect, because I did not make a close examination of it.

Q. Do you say that the rim of the wheel was broken?

A. It was broken, yes, sir; the wheel seemed to be in several pieces.

Q. Can you tell the jury to what extent it was broken; how many pieces were there?

A. I could not tell how many; there were three or four.

Q. Were there any indications of any flaws or cracks in the rim of the wheel where it was broken?

A. There were no indications of any flaws in the wheel.

Q. So far as you are able to judge from what you saw there, what would you say broke the wheel itself?

A. I would judge it was the fall upon the track or dragging of the wheel that broke the wheel. That was my impression at the time.

Page 76.

Q. Was the portion of the hole in which the shaft had been put in broken out any?

A. The edges of the timber were torn and this side of the car was torn around the hole; that would necessarily be the case if the rod came out; that is all I could say in regard to it.

Page 77.

O'Rourke. (Page 79.)

Q. State, without my asking questions in detail, what you did and what you saw there, giving a history of all the circumstances.

A. * * * * I then went out to look about the cars to see how the accident occurred, and I found several parties—six or eight—standing on the ground near the end of the car, and they had the chain in their hand and the hoop of the wheel, and the chain was attached to this rod here (indicating), and the hoop, a portion of the spokes, and a small piece of the rim remained, and they had that in their hands and was examining one of these breaks; it was broke across here—this portion (indicating).

Q. State, in connection with this, whether the bracket was like the one that you have here.

A. Not exactly; that one had square corners and was similar to this, though not exactly like it. There was no web in here; it was broken off in that condition (indicating) leaving these two pieces that were bolted on the car still on the car, and the opposite pieces that were broken off attached the shaft and hoop. When I got to the end of the car there was a lot of men standing there, and they had this piece up there (indicating) in their hand and were examining one of these portions of the brace, and said there was a flaw in it. I walked up to whoever had it in his hand and took it out of his hand, and with the light that was there, holding it close to the lantern, I picked it with my finger nail, and I remarked, there is no flaw here; this is where it has been dragged on the sand and the sand has touched this portion of it; it is a little longer than the rest, and I picked the sand out with the end of my finger, and it came out readily. I then said, "gentlemen, we can very readily settle this question." The opposite portion of the break is on the end of the car, and I at once climbed on the platform, about four feet from the ground, and the bracket or brace attached to the car is about four feet up from the platform, perhaps a little more or less, leaving it about eight feet from the ground up to the bracket. I climbed up on the end of the car, and when I got on the platform I asked the gentleman who had the lamp in his hands to give it to me, and I stood up close to the bracket and examined both breaks, and I am positive there was not a particle of sand, crack or rust there, and I turned around to the gentlemen there, and I said, "Gentlemen, this settles the question; this is a clean break; get up here and examine it for yourselves; you can see as well as I can." I called to them twice, I recollect distinctly, but no one got up, and I then handed the lamp down and climbed down off the car. After getting down I again picked up this broken part and some of the men still remained there, and I showed it to the portion that remained there and said to them, "Any of you can see clearly for yourself, if you will get up and examine it, that it is just as I have said," but no one did so.

Q. What do you say now as to whether there were any flaws there?

A. I say most distinctly that there was not any flaw, not even a crack the size of a hair, in any one of these braces.

Q. State whether there was anything in the external appearance of the iron of that bracket that would indicate any weakness about it or that it was unsafe.

A. Nothing that I could see; nothing in the bracket in any way, shape or manner.

Pp. 80–81.

Q. Did you look into the hole from which that shaft came out?

A. I looked there, and my recollection is that the siding was up and down, and when the journal came out suddenly it had taken the edges off of the siding, stripping off a piece at the top end an eighth of an inch thick, and growing thinner as it went down—that is, where the end of the axle would catch it—and ripped off a splinter. Beyond that there was no break.

Q. Where it came out it just took off a splinter?

A. Yes, sir; where it came out it ripped off a splinter off the weather boarding and took it off.

By the court:

Q. Was that axle broken in this accident?

A. No, sir; the axle was not broken. The break that caused the accident was the break in the brace, and when the wheel broke down this portion of the wheel (indicating) struck against either the rail or the end of the ties, and the train still ran on some distance, and bobbed it along and broke some portion of the rim, it being cast iron, and dragged that along.

Page 82.

Cross-examination.

Q. What were you doing on the deadwood?

A. I went to see what caused the accident.

Q. When you went out there and got up on the deadwood, or platform, and called the people to get up there, you were simply looking after the interest of the railroad company?

A. I was looking after the interest of truth, as an assertion had been made that there wes a flaw there, and I climbed up and asked a gentleman there for a lamp and examined it up there. I was looking to ascertain the truth without any special view as to anybody's interest. Being superintendent of the road, I naturally felt an interest, possibly in the interest of the company, and also an interest in the employee, who we looked on at the time as one of the family.

Q. At the time you got up there and spoke about these brakes you heard others about there remarking about them?

A. That there was a flaw?

Q. Yes.

A. Yes; and then to satisfy myself I climbed up and asked for a lantern, and looked at it and saw that it was a clean break.

Q. But others examined it below and said there was a flaw at the same time?

A. Yes, sir; they said there was a flaw, and scattered off when I called attention to the other.

Q. You said that there was no flaw or crack the size of a hair.

A. I say there was no flaw.

Page 85.

Q. You say that night the pieces were all there of the wheel?

A. I did not say they were all there; I say there were portions of it there.

Q. You spoke about the wheel being broke as it fell upon the track?

A. I said in all probability when it fell over it either struck the track or ties, and in dragging along this part was broke off.

Q. You do not know how it was broken?

A. No, sir; I suppose it was either from the falling on the rail or dragging against the end of the ties.

Q. After the pieces were gathered up there did you have possession of them?

A. I saw them.

Q. Did you not have possession of them and have them carried off?

A. I did not.

Q. You did not have possession of any of them?

A. No; not one single part. I do not know what became of the wheel or any piece of it.

Q. If you were looking after the interests of the railroad company, and knew that piece was a sound piece, and that one of the others said—was cracked at that time, why did you not preserve it and have it here?

A. The reason is, I did not think it necessary to preserve it. I examined it there on the car and asked others to come up and examine it and settle the question, but they did not do it, and I deemed it was not necessary, and that it was a clear established fact.

Q. After you had heard others assert that there was a crack in the wheel?

A. That was previous to a thorough examination.

Q. After you had heard it you did not think it was necessary to preserve the piece to establish the fact that there was no crack?

A. No, sir.

Q. But permitted it to be taken away?

A. It was lying there; I presume it was gathered up with scraps as all such matters are.

Q. You say that this shaft that came out of the car just flayed a little splinter off of the side of the hole?

A. Yes, sir; about that long—about an eighth of an inch at the top, and thinned out as it went down.

Pages 85, 86.

Q. Did you examine the shaft of the wheel that night that went into the car, to see whether there was a pin in there or not?

A. There was no pin in it.

Q. Was there a bur on the end of it?

A. No, sir.

Q. Was there any thread cut for the bur?

A. That I could not say.

Page 87.

XIII.

There is no evidence in the case tending to show, or from which it can be inferred, that the giving way of the brake resulted from any pre-existing defect. It does appear, conclusively, we think, that the plaintiff must have been resting his whole weight upon the brake when it gave way, otherwise he would not have fallen to the ground. If he had been using his hands only to turn the wheel, and it had broken or given way, he would not have fallen. The fact that he did fall when the brake gave way shows conclusively that he must have been supporting himself (to use the expression of one of the witnesses), "by hanging on to the brake."

We have already given in full all the testimony as to the condition of the brake, so far as any one observed it, after the accident. There is nothing, we submit, in that testimony, or in the fact that the brake gave way, under the circumstances, which affords any ground for the inference that the giving way was caused by a pre-existing defect.

XIV.

Under the allegations in the complaint any defect other than one which may have existed in the wheel and rim, was wholly immaterial, and a recovery could not be predicated upon any such defects.

It was therefore error for the court to submit the case to the jury on the theory that they might find for the plaintiff on account of a defect in the brace. We have already quoted the language of the allegations and of the instructions.

(20th assignment of error).

XV.

It was error to submit to the jury the question as to defect in the brace, for the reason that there is no evidence to support a finding that there was any defect in the brace before the accident. The testimony has already been given in full under XII, *ante*.

It is sufficient at this point to say that the witnesses Mason, Rhinehart and Moore do not mention the brace. Westler testifies (page 44, Pr. Rec.) that "This brace was all right; it was good." O'Rourke testified that the breaks in the brace were fresh, and that there was no

flaw in the brace (pages 80, 81). Wright testified that he did not examine the arm on the car to see whether there was any flaw there or not (page 74, last question). See this witness' testimony as to sand flaw in bracket on page 72 (answer at the No. 155). The above is all the evidence in the case as to a pre-existing defect in the brace.

The defendant, for the errors herein alleged, respectfully prays that the judgment of the Circuit Court for the District of Indiana be reversed.

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